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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

SARAH N. PHELPS,
Petitioner,

v.

YALE SECURITY, INC.,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

What amount and what type of evidence is required for a Plaintiff to be allowed a jury determination of facts and credibility in an age discrimination "reduction-in-force" case?

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SARAH N. PHELPS,
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Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Sarah N. Phelps, the Petitioner, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit that was entered in this case on February 26, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Phelps v. Yale Security, Inc.*, 986 F.2d 1020 (6th Cir. 1993), and is reprinted in the Appendix hereto at page A-1. The Memorandum Opinion of the United States Magistrate, granting Yale Security, Inc.'s Motion for Judgment Notwithstanding the Verdict is reprinted in the Appendix hereto at page A-11.

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. § 621, *et seq.* the Petitioner brought this suit in the United District Court for the Eastern District of Tennessee. After a jury trial, judgment was entered for Petitioner. Thereafter, Respondent filed a Motion for Judgment Notwithstanding the Verdict which was granted by the Magistrate. On appeal, the Sixth Circuit on February 26, 1993, affirmed the decision of the District Court. (See Appendix p. A-1). No rehearing was sought before the Court of Appeals and no extension of time for filing this petition

was sought from this Court. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

STATUTE INVOLVED

The Petitioner sued pursuant to 29 U.S.C. § 623(a)(1) which provides in pertinent part:

> It shall be unlawful for an employer:
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

STATEMENT OF THE CASE

The Petitioner, a former secretary of Yale Security, brought an ADEA, 29 USC § 621, *et seq.*, action against Respondent alleging she was discriminated against in connection with the termination of her employment. The jury found the issues joined in her favor and judgment was entered. The Magistrate granted Judgment Notwithstanding the Verdict and the Sixth Circuit affirmed the JNOV.

The Respondent hired the Petitioner as a secretary on June 16, 1977, and she remained continuously employed by the Respondent until she was terminated on July 8, 1988, at age 55, pursuant to an alleged "reduction-in-force" which Petitioner alleged was pretextual. The Respondent had a total of 439 employees at the Lenoir City plant in June before the "reduction-in-force," it had a total of 439 employees in July after the "reduction-in-force," and its total work force had increased to 452 by August. Petitioner was a salaried employee, and Respondent had 83 salaried employees in January of 1988, 86 salaried employees in June, and 86 salaried employees in August, one

month after the "reduction." The Sixth Circuit did not address this evidence in its opinion.

In the Summer or Fall of 1987, Plant Manager, Avery Petty, moved Petitioner (at age 54) from the Plant Manager secretary's office to another office and Ray McCulloch, Factory Manager, became her direct supervisor.[1] The Petitioner continued to do work for the Plant Manager even after she was moved. Petty told former Plant Manager, Cox, he was not going to fill the secretary position. However, on September 1, 1987, Respondent hired a new secretary, Sara Lemmons (age 39). At some point after the transfer, the Petitioner was told by her new supervisor that she had become "excess baggage" and she was in a layoff-prone position. Avery Petty testified he transferred her because he felt she had talked about salaries or raises in the ladies' room. The Petitioner was not written up for this, and the alleged incident of her discussing salaries was the only criticism Petty ever had of her, and he testified he talked to Petitioner

[1]The Petitioner includes a complete statement of the facts (in the light most favorable to Petitioner) with citations to the record in the Appendix at p. A-40.

about this at least once. In its opinion, the Sixth Circuit failed to mention that the Petitioner denied she ever divulged or discussed salaries, and denied an alleged problem with confidentiality of salaries was discussed with her at any time. Mr. Petty also testified he was "pleased" with the Petitioner's work and he rated her satisfactory.[2]

Due to the fact that Petitioner was in a layoff-prone position, her new supervisor, McCulloch, undertook to train Petitioner as a dispatcher so she would have a position to move

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[2]For the vast majority of the Plaintiff's career, she was the secretary for the Plant Manager. Defendant considered this a "clerical" position. The Plaintiff received a merit raise each year of her employment. The Plaintiff was evaluated annually, and on most of her appraisals, she was recommended for promotion. During her employment, she was appraised by three different supervisors and she received three "satisfactory" appraisals and seven "above average" appraisals most of which contained very complimentary remarks. For most of her career at Defendant, she worked as secretary for Charles Cox, Plant Manager, and he testified on her behalf at trial. Cox was Plant Manager from August of 1976 until February 1986. Cox was promoted to Coordinator of Special Projects in 1986, and Avery Petty became Plant Manager. Cox returned to the Lenoir City plant as "Interim Operations Manager" in 1988 after the layoff and Petty had reporting duties to him. In 1989, Cox was promoted to Vice President of Administration.

into when her position was eliminated. Petitioner had previously been recommended for promotion to a dispatcher job or planning job. McCulloch, in fact, had been instructed in December of 1987, to consider which positions could be eliminated. One of the dispatchers, Dorothy Graves, was planning on retiring, and Petitioner was being trained for her job. Graves did retire effective April 1, 1988, but for reasons never explained by Respondent, Petitioner did not get the job and the record discloses that two young dispatchers were hired (shortly before the layoff) in mid or late May of 1988: Monger (age 32) and Fickey (age 24). Cox testified that the Petitioner was qualified for a dispatcher position. In its opinion, the Sixth Circuit failed to discuss this evidence.

The following employees were "laid off" on July 8, 1988:

Name	Date of Hire	Position	Age as of 07/08/88
Phelps, Sarah	08/16/77	Secretary	55
Fickey, David	05/16/88	Dispatcher	24
Pressley, Melvin	08/21/56	Designer	56
Plemmons, Coy	06/16/54	Timekeeper	53

In the light most favorable to Petitioner, the "decision makers" for this layoff were Robinson, McCulloch, and Petty, and Atkins had the final review. The Sixth Circuit concluded "[t]here is no evidence, however, that McCulloch or the other heads made the elimination decisions after consulting with anyone outside their respective departments." (Opinion, Appendix, page A-11). However, the Sixth Circuit failed to consider McCulloch's testimony that he attended a meeting with staff level management of Respondent wherein he allegedly fought for Sarah Phelps' position and where the layoff decisions were by "mutual agreement." (Excerpt of Transcript in Appendix, page A-74). The proof showed that Coy Plemmons (age 53), Melvin Pressley (age 56), and Sarah Phelps (age 55) were not recalled or rehired by the Respondent and that Pressley and Phelps were not considered for any other positions.[3] The proof showed that Lynn

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[3]Petitioner specifically asked about a dispatcher position at her termination meeting. Petitioner wrote a letter dated August 2, 1988, to the President of the Defendant requesting reinstatement, with a copy going to the Human Resources Manager, Mike (continued...)

Harvey (age 29) was back at work in Data Entry within two weeks of the "layoff," and she was given the "clerical" position of Customer Service Clerk on August 16, 1988. The Sixth Circuit dismissed this evidence on the grounds that another employee (who never testified at trial) had allegedly requested Harvey for this position. (See Opinion, page A-11). The Sixth Circuit in its opinion never mentioned Respondent's Position Statement to the EEOC where Respondent admitted that Petitioner was qualified for the position and that it considered her for the position. The

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[3](...continued)
Robinson. Pressley also asked for other positions during his termination meeting. Shortly after the "layoff" Fickey and Harvey were back at work. The proof showed that the employees who were recalled or newly hired had lower salaries than the older employees who were laid off permanently. The Defendant admitted that the Plaintiff was not considered for any other position at the time of her termination or when the Defendant started filling positions immediately before or immediately after the termination, and neither was Melvin Pressley. The proof also showed that Melvin Pressley was a satisfactory employee, he did an "incredible" job according to Plant Manager Petty, and he had worked for two years as a dispatcher. The proof showed that other young employees were promoted and shifted into different positions at or about the time of this layoff, including Susan Robinette (age 34), who was promoted from Clerk to Expeditor (a clerical position) in the Customer Service Department effective August 1, 1988, and Robert Cox (age 37), who was shifted (with a raise) from Dispatcher to Planner-Product.

Respondent asserted that Petitioner was ruled out for the Customer Service job because:

> "Concededly Mrs. Phelps had the ability to perform the typing, filing, and record keeping aspects of the Customer Service Clerk position. However, the position also requires direct customer contact and because it was felt Mrs. Phelps lacked the ability to relate to third persons in the manner the company insisted was necessary, it was determined that she would not have been a good candidate for the Customer Service Position." [Emphasis Added.] (From Respondent's Position Statement furnished to EEOC - reprinted in the Appendix hereto at page A-67).

Not a single witness at trial testified that Petitioner had a problem relating to third persons, but to the contrary, all witnesses testified that she related well to third parties. The Sixth Circuit failed to mention this clear evidence of pretext in its opinion. Following the "reduction," the Respondent had the following employees in the Customer Service Department in clerical positions:

Name	Date of Birth	Position	Age as of 08/16/88
Harvey, Lynn	03/02/59	Clerk/Customer Service	29
Moore, Rick	06/08/58	Expeditor	30
Robinette, Susan	04/29/54	Expeditor	34

The Respondent hired Rick Moore (age 30) either on June 20, 1988 and/or August 1, 1988. The Respondent shifted Susan Robinette (age 34) from being a clerk in Production Control to the Expeditor position in Customer Service on or before August 1, 1988. The "decision-makers" for a transfer would be Robinson and Petty. The Respondent considered these clerical positions and Petitioner was qualified for the positions. The Sixth Circuit failed to consider or discuss this evidence in its opinion.

The proof in this case showed also that after the Petitioner was moved into the layoff-prone position under Ray McCulloch's supervision, "decision-maker" McCulloch made statements to the effect that "if you were younger you would still be Mr. Petty's secretary," "you're too old to be Mr. Petty's secretary," and "you're too old for Petty." These comments occurred in late Summer or Fall of 1987. McCulloch admitted to Petitioner that they had "older" women in her position before and "that they've had to be retired." Additionally, there was proof that shortly after the Petitioner's 55th birthday (date of birth: November 29, 1932), she asked Mr. McCulloch if she should be

concerned about her age in the context of continued employment, and he said, "[a]bsolutely," and they were all concerned about their ages, and he didn't know if he would last there until he was 60. In fact, the date of this last conversation was during the time period Petitioner's supervisor received the memorandum concerning potential "headcount" reductions. (Copy of Memorandum in Appendix at page A-72). All of these remarks were made during the last year of her employment by her direct supervisor after Petitioner had been moved into a layoff prone position, and McCulloch clearly was a decision-maker, as was Petty. The Sixth Circuit dismissed these comments on the ground that the statements were made "too long before the layoff to have influenced the termination decision." (Appendix, p. A-9). The Court dismissed the comment regarding Petitioner's birthday as being "too ambiguous." (Appendix, p. A-9).

The proof showed Respondent's "policy" was to layoff the least senior employees within the same classification if abilities were the same. Petty also testified that pursuant to company policy, given employees in the same classification whose

skills were the same, supervisors would keep the more senior employees. In the light most favorable to Petitioner, she was classified as a secretary at the time of her termination. This was her title on the Job Title Listing Report and her supervisor regarded her as his secretary. The only other secretary at the time of the "reduction" was Sara Lemmons (age 39), and she had been on payroll for less than a year and she had questionable typing, spelling, and grammar skills.[4] In fact, Petty admitted he did not let Petitioner bump Sara Lemmons (age 39) due to Petitioner's alleged "confidentiality" problem and Lemmons was not laid off. The Sixth Circuit failed to consider any evidence dealing with Petitioner's transfer holding it was "time barred" and failed to consider Petty's admission that he considered allowing Petitioner to bump his new secretary at the time of the layoff, but ruled her out due to the aforementioned reason which a reasonable jury could view as pretextual.

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[4]See Memorandum in Appendix directing Plaintiff's supervisor to consider head count reductions typed by Sara Lemmons and reprinted at page A-72.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Sixth Circuit's decision as to the amount and type of proof required for a Petitioner to be allowed a jury determination of facts and credibility in a reduction-in-force age discrimination case is in conflict with decisions from the Second, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits on the same matter and with applicable decisions of this Court.

The ADEA "broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 565, 577, 98 S. Ct. 866, 55 L.Ed. 2d 40 (1978). As stated in *Hazen Paper Co. v. Biggins*, ___U.S. ___, 113 S.Ct. 1701 (1993): "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Id.* p. 1706. As stated in connection with Title VII:

> [a]ll Courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights

> Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the allocation of burdens and order of presentation of proof" ... in deciding this ultimate question."[5] [Emphasis Added.] *United Stated Postal Service Board of Governors v. Aikens,* 460, U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed. 2d 403 (1983).

The Petitioner would respectfully submit that the prohibition against age discrimination also reflects an important national policy. The Petitioner would respectfully submit that age discrimination is difficult to prove and fact finders in discrimination cases should be afforded the same deference accorded to fact finders in other civil cases. The Petitioner would respectfully submit that the lower Courts treated credibility determinations and factual findings in this age discrimination case differently than other civil cases. Perhaps this result is caused in

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[5]Quoting *Texas Department of Community Affairs v. Burdine* 450 U.S. 248, 252, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

part by the utilization of the analytical framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973) which of course was initially developed in a nonjury (failure to hire) setting, and perhaps as well, by a mistrust of the integrity of the jury system as it applies in age discrimination cases.[6] As a result, Plaintiffs in age discrimination

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[6]As one author has noted:

> ... the courts continue to struggle with the application of the *McDonnell Douglas* formula to ADEA jury trials. As a result of this tension in the scheme, the Courts have too frequently set aside verdicts that juries have returned for ADEA Plaintiffs using the *McDonnell Douglas* framework." [Emphasis Added.] *Note: Age Discrimination*, 73 Va. Law Rev. 601, (1987).

The willingness of a court to deprive a discrimination victim of a jury determination of facts and credibility may be due to a fear that juries will be sympathetic to the employee. *See Chappell v. GTE Products Corp.,* 803 F.2d 261, 265 (6th Cir. 1986). *See also, Lovelace v. Sherwin Williams*, 681 F.2d 230, 242 (4th Cir. 1980). However, it appears that these concerns are unfounded. In an article entitled, "The Age Discrimination in Employment Act: A Review of Court Decisions," Barrett and Snyder, 14 *Experimental Aging Research*, 1, (1988), Beech Hill Enterprises Inc., the authors conclude:

> "of the 272 cases dealing with factual issues,

(continued...)

cases are effectively being deprived of their right to a jury determination of factual issues and credibility issues contrary to the important national policy represented by the ADEA.[7]

The Respondent's justification for Petitioner's termination in the present case was that it was because of a

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[6](...continued)

> review, 65% were decided for the employer and 35% for the employee. This constitutes powerful evidence against the popular belief that it is extremely difficult for an employer to win an age discrimination suit, especially with a jury trial." [Emphasis Added.]

[7]See, *Ridenour v. The Lawson Company*, 791 F.2d 52, 58 (6th Cir. 1986) (Judge Keith dissenting: "I find no reason to second guess the jury."); *Chappell v. GTE Products Corp.*, 803 F.2d 261 (6th Cir. 1986); *Dabrowski v. Warner-Lambert Co.*, 815 F.2d 1076 (6th Cir. 1987), *Simpson v. Midland-Ross Corp.*, 823 F.2d 937 (6th Cir. 1987); *Wheeler v. McKinley Enterprises*, 937 F.2d 1158, 1166 (6th Cir. 1991) ["viewing the evidence as a whole, finally, we have serious reservations as to whether the jury's verdict on the threshold liability issue was in accordance with the manifest weight of the evidence"]; See also, *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405 (7th Cir. 1984); and *Krieg v. Paul Revere Life Insurance Co.*, 718 F.2d 998 (11th Cir. 1983) *cert denied*, 466 U.S. 929, 1003 (1984) [Judge Kravitch dissenting: "[t]he majority failed to show why the evidence was inadequate to permit the jury to infer discrimination."]

"reduction-in-force" necessary to meet the three to one ratio of manufacturing workers to salaried employees. Of course, there was no written documentation of this "reason." The Sixth Circuit apparently accepted this explanation even though a reasonable jury could conclude this "reason" was pretextual (i.e., not "legitimate") since the ratio is easily manipulated by an increase in the size of the manufacturing work force and Respondent's work force actually increased in size during the relevant time period, but three older employees were permanently let go while Respondent was actively hiring (and transferring) younger similarly situated employees. The result in *Phelps* is in apparent contradiction with at least two other Sixth Circuit cases which accepted evidence showing that the Defendants' claims of reduction-in-force and/or corporate reorganization as pretextual. *See, Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 915 F.2d 201, 209 (6th Cir. 1990) and *McMahon v. Libbey-Owens-Ford Co.*, 870 F.2d 1073, 1076 (6th Cir. 1989). The Third Circuit in *Anastasio v. Schering Corp.*, 838 F.2d 701 (3d. Cir. 1988), affirmed a jury verdict for the Petitioner, based in part on the fact that the

Respondent claimed the Petitioner's position was being eliminated and there was a need to eliminate three positions within the department and then turned around and filled three positions within the department. In *Montana v. First Federal S&L of Rochester*, 869 F.2d 100 (2nd Cir. 1989), the Second Circuit overturned summary judgment granted in a "reduction-in-force" case. In so doing, the Second Circuit held that the alleged "reduction-in-force" was pretextual in light of the evidence that the discharged employees' responsibilities were reassigned to younger employees, that she was not offered an opportunity to transfer and that after the discharge the employer created new positions which the Petitioner was not offered or even considered. *See Montana*, 869 F.2d at 105-106. The Petitioner respectfully submits that the *Phelps* decision conflicts with the above mentioned cases, because in *Phelps*, the only "reduction" that occurred, was three older employees were permanently let go while Respondent was actively hiring and/or actively transferring similarly situated younger employees in jobs Petitioner was qualified to perform, and the size of Respondent's work force

actually increased during the relevant time period. The Petitioner respectfully submits that guidelines are needed on whether a Plaintiff can prevail in a "reduction-in-force" case where there is evidence of pretext and where there is other evidence of discrimination in order to develop consistency in court rulings. The Petitioner would respectfully submit that it is time for the Court to address the extent to which the *McDonnell Douglas,* framework is applicable to age discrimination termination cases in general and to "reduction-in-force" cases in particular. The Petitioner would respectfully submit that this Honorable Court should adopt a consistent rule of law setting forth or clarifying the amount and type of evidence necessary in an age discrimination case to allow a jury determination of the facts and credibility and stating under what circumstances, if any, should a court substitute its own credibility determinations and factual findings for that of the jury.

In discussing the elements necessary to establish a prima facie case, the Sixth Circuit in *Phelps,* citing *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1465 (6th Cir.) *cert. denied*, 111

S.Ct. 211 (1990), touched on the *McDonnell Douglas* framework and noted that:

> "[i]n a case arising out of a work force reduction, the fourth requirement is modified so that the Plaintiff must also demonstrate some direct circumstantial, or statistical evidence tending to indicate that the employer singled out the Plaintiff for discharge for impermissible reasons." (Appendix, page A-4 - A-5).

The Court thereafter, in affirming the Judgment Notwithstanding the Verdict, failed to discuss clear evidence of pretext such as the increase in the size of Respondent's work force, and Respondent's excuse that Petitioner had problems in dealing with third parties and/or her alleged problems with confidentiality (which had allegedly been used to rule her out for positions given to younger similarly situated employees), and other circumstantial evidence of discrimination. The *Barnes, supra,* case used the approach in *Matthews v. Allis Chambers,* 769 F.2d 1215, 1217 (7th Cir. 1985) which was specifically overruled in *Oxman v. WLS-TV,* 846 F.2d 448 (7th Cir. 1988). The Court in *Oxman,* noted that:

> ...A terminated employee within the protected age group who can show that

> *others not in the protected class were treated more favorably*, therefore, should not be required to uncover evidence of discriminatory intent on the part of the employer to make out a prima facie case of discrimination under the ADEA. Such a showing is enough to create a reasonable inference under *McDonnell Douglas* that age was a determining factor in the employer's decision. We therefore hold that *Oxman* can establish a prima facie case by showing that he was within the protected age group, that he was performing according to his employer's legitimate expectations, that he was terminated, and that others not in the protected age class were treated more favorably. This formulation merely requires an employer that releases a protected employee while simultaneously hiring (or not "bumping") younger employees to fill positions for which the older employee was qualified to explain its actions without forcing the protected employee to uncover that elusive "smoking gun." (*See Oxman* at 455-56). [Emphasis Added.]

The Petitioner would urge this Court to consider adopting the rule enunciated in *Oxman, supra*, so that the Courts, and the parties, will have a consistent rule to follow and so that the strong legislative policy represented by the ADEA will not be defeated.

In *Phelps* there was evidence that positions were available which the Petitioner could have been transferred or

hired into (and for which she was qualified) but which went to younger similarly situated employees. The Sixth Circuit in *Phelps* in upholding the Judgment Notwithstanding the Verdict, did not address relevant circumstantial evidence such as the treatment of Monger (age 33), Moore (age 30), Robinette (age 34), and Robert Cox (age 37) who were hired into and/or transferred to positions which the Petitioner was qualified to perform at or about the time of the "reduction-in-force" or the fact that Petitioner was being trained to take over a dispatcher position since Petitioner was in a layoff prone position, but when the dispatcher retired on April 1, 1988, Petitioner was not given the job. Instead, Respondent hired, in May of 1988, two young dispatchers who either retained their jobs or were recalled shortly after the "reduction-in-force." Further, while the Sixth Circuit in *Phelps* noted that five employees were laid off on July 8, 1988 (ages 56, 55, 53, 29, and 24) and only the two youngest employees were recalled, (Harvey, age 29 and Fickey, age 24), the Sixth Circuit did no more than weigh the evidence and decide that Harvey was recalled into a Customer Service position by a

different person (who didn't even testify) than who terminated Phelps and thus there was "no conspiracy to discriminate based on age" and it determined that Fickey was more qualified for the dispatcher position available. (*See Phelps* Opinion, p. A-7). In so doing, the Sixth Circuit overlooked the position statement filed with the EEOC in which Respondent admitted it considered Phelps for the position given to Harvey, but ruled her out due to her alleged problems relating to third parties which Petitioner unequivocally established was pretextual, since everyone who testified said she related well to third parties. The *Phelps* Court also apparently disregarded the Sixth Circuit ruling in *Hawley v. Dresser Industries, Inc.*, 958 F.2d 720, 723 (6th Cir. 1992), which held that a Plaintiff may establish that age was a determining factor in the adverse action by showing that some employees were shifted to other positions, that the Plaintiff was qualified for, that he was not given a new position and that the decision not to place him in a new position was motivated by Plaintiff's age. This Court has recently noted in a disparate treatment case:

"[p]roof of discriminatory motive is critical,

> although it can in some situations be inferred from the mere fact of differences in treatment. ..." [Emphasis Added] *Hazen Paper Co. v. Biggins,* ___ U.S. ___, 113 S.Ct. 1701, ___ L.Ed. ___ (1993) *quoting Teamsters v. United States,* 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 52 L.Ed. 396 (1977).

In *Hazen, supra,* the Court referred to evidentiary support cited by the Court of Appeals for ADEA liability and noted:

> "[i]n the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the Plaintiff also shows that the employer's explanation for its decision ... is 'unworthy of credence.'" *Id.* p. 1707.

In *Phelps,* there was sufficient evidence of a difference in treatment from which a reasonable jury could infer discrimination. The Sixth Circuit also failed to consider the admitted fact that Respondent refused to allow Petitioner to return to her prior position as Plant Secretary at the time of the layoff and kept the recently hired 39 year old Sara Lemmons instead (even though Lemmons had questionable typing and spelling skills)[8] due to Petitioner's alleged "confidentiality problem" and her alleged

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[8]See memo typed by Lemmons attached at A-72.

problems in relating to third parties which a reasonable jury could have concluded were pretextual.[9]

In *Ayala v. Mayfair Molded Products Corp.*, 831 F.2d 1314 (7th Cir. 1987) the Plaintiffs presented evidence at trial that at the time of their discharge they were qualified to perform at least one other position in the company. The Plaintiffs further contended that they produced evidence in which a jury could reasonably conclude that the Defendant consciously refused to consider retaining or relocating them because of their age. After the discharge, two of the Plaintiffs came back and asked for work. They were told that there were no openings. However, there was proof that new positions were filled. The employees that filled the new positions were under 40 years of age. The Seventh Circuit, in upholding the District Court denial of the Defendant's Motion for Judgment Notwithstanding the Verdict and New Trial, held the Defendant's failure to hire the Plaintiffs and the hiring of younger workers for jobs that became available shortly after the Plaintiffs were discharged, constituted discrimination based on

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[9]See EEOC position statement Appendix p. A-67.

age. The Court in *Ayala* didn't make credibility determinations or weigh the evidence, but instead noted that "the case was certainly hard fought at trial and there was sufficient evidence to support the verdict." *See Ayala* at 1320. In *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985), the Fifth Circuit reversed a district court decision granting the Defendant's Summary Judgment Motion in a "reduction-in-force" case. In so doing, the Fifth Circuit noted that the Plaintiff did not attempt to prove that any remarks concerning his age were made and he did not offer any statistical proof. Instead, he offered proof that several younger allegedly less qualified employees were retained during the reduction-in-force, and that at the time of his discharge, two younger, allegedly less well-qualified employees were hired. *See Thornbrough* at 643. The Court noted that in a reduction-in-force case, what creates the prescription of discrimination is not the discharge itself, but rather the discharge coupled with the retention of younger employees. *See Thornbrough*, at 644. In *Herold v. Hajoca Corp.*, 864 F.2d 317 (4th Cir. 1988) the Fourth Circuit upheld a jury verdict for the Plaintiff

based on evidence that the reasons given by the Defendant for retaining younger employees in positions the Plaintiff was qualified for could have been pretextual. The jury could properly have found that the articulated reasons were pretextual and determining witness credibility was an issue for the jury. *See Herold*, 864 F.2d at 320-21. This is the exact situation in the present case where Respondent asserted that Petitioner was rejected for the "new" position given to Lynn Harvey, age 29, (or Sara Lemmons, age 39) due to an inability to relate to third parties. Petitioner proved this excuse was a lie. The lower courts took away the fact finding role from the jury and made their own decision on credibility and weighed the evidence.

This decision creates a conflict among the Circuits based on the significance of proof of statements or age related comments which are indicative of age discrimination. In the present case, statements indicative of age discrimination (or bias) were made to the Petitioner, Phelps, by her supervisor, McCulloch, who participated in the termination decision. In rejecting this evidence, the Sixth Circuit adopted a new rule of

law and stated that:

> "Because McCulloch made the statements nearly a year before the layoff, the comments were made too long before the layoff to have influenced the termination decision." (*See* Appendix p. A-9).

The Sixth Circuit overlooked the proof that the statements were made in the context of the Petitioner being moved to a layoff prone position and that this same supervisor had received a memorandum from the plant manager, dated December 9, 1987, directing him to consider head count reductions.[10] The Petitioner would respectfully submit that if the decision maker thought the Petitioner was "too old" in the Fall of 1987, when she was transferred to a layoff prone position, it stands to reason that she is still going to be "too old" eight to nine months later. During the *Phelps* trial, the Magistrate issued a Memorandum Opinion concerning the admissability of the statements of Ray McCulloch which stated in pertinent part:

> "The undersigned is of the opinion that these statements may have some relevance because <u>there is evidence in this</u>

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[10]See memorandum in Appendix at page A-72.

> record that Ray McCulloch, Mike Robinson, and Avery Petty all participated in the decision, at least to some extent, to terminate the Plaintiff in July of 1988. The statement may have some probative value with regard to Mr. McCulloch's state of mind regarding the treatment of older persons at the plant. It may also have some probative value regarding Mr. Petty's treatment of older persons versus younger persons. *See Normand v. Research Institute of America, Inc.*, 927 F.2d 857, 864 (5th Cir. 1991). [Emphasis Added.] (*See* Memorandum included in the Appendix at page A-37).

In *Normand v. Research Institute of America, Inc.*, 927 F.2d 857 (5th Cir. 1991), statements were held to be relevant even though one statement that the project was "too big for an old person to handle" was made in 1983 and the termination was in 1986. The Court noted that statements made by a decision-maker were important, even though far removed in time. *Normand*, at 863. In distinguishing *Gagne' v. Northwestern National Life Insurance Co.*, 881 F.2d 309 (6th Cir. 1989), the Court in *Normand* noted that:

> in that case as well as others, remarks attributed to Defendants were either made by someone who did not participate in the

> decision to terminate the Plaintiff or they were isolated comments and were the Plaintiff's only evidence of discrimination. *Normand*, at 864, fn. 3.

In *Clements v. General Acc. Ins. Co. of America*, 821 F.2d 489 (8th Cir. 1987) the Eighth Circuit, in reversing the entry of a Judgment Notwithstanding the Verdict, noted that there was testimony that the decision maker had stated that he would prefer to hire younger men to fill certain positions and that older people performed less competently than younger people on certain tests. While these statements were made several years prior to the termination of Clements and were made in reference to positions other than the Plaintiff's position, they were nonetheless probative of a general intent or inclination to discriminate. *See Clements* at 492. In *Lindsey v. American Cast Iron Pipe Co.*, 772 F.2d 799 (11th Cir. 1985) in reversing a Judgment Notwithstanding the Verdict entered for the employer, the Eleventh Circuit held that a statement made on October 1, 1979, that the company would be looking for a younger person to fill the position, coupled with the company's eventual decision (in the Spring of 1981) to hire an

employee 18 years younger than the Plaintiff constituted evidence sufficient to support this verdict. *See Lindsey*, 772 F.2d at 801. Apparently, had the *Phelps* case been heard in the Fifth, Eighth, or Eleventh Circuits the statements of her supervisor (and "decision maker") would have been pertinent.

A final reason the Petitioner seeks review from this Honorable Court is that the *Phelps* decision also creates a conflict among the circuits as to the evidentiary significance of facts that occurred prior to the time period covered by a charge of discrimination. The Sixth Circuit in *Phelps* did not even consider the evidence related to the Petitioner's transfer, in the Summer or Fall of 1987 when she was moved into a layoff prone position and she was replaced by a person fifteen (15) years younger than herself, but instead stated:

> "in regard to the assertion that she was wrongfully transferred, Phelps' claim is untimely." The district court correctly decided that Phelps did not file a timely charge of age discrimination within 300 days of her transfer in 1987, in accordance with 29 USC § 626(d). (*See Phelps* at A-6).

The Petitioner, of course, was not suing for "wrongful transfer."

Evidence of earlier discriminatory conduct can help prove a timely claim based on subsequent discriminatory conduct. In *Matthewson v. National Automatic Tool Company, Inc.*, 807 F.2d 87 (7th Cir. 1986), the Seventh Circuit, in overturning a district court's grant of a Motion for Judgment Notwithstanding the Verdict, based its decision in part upon evidence of Plaintiff's demotion which was time barred, but which nonetheless was relevant to the Plaintiff's subsequent timely claim based on subsequent discriminatory conduct by the employer. The *Matthewson* case is similar to the present case. In the *Matthewson* case, the Plaintiff was demoted and her position was taken over by another employee, age 29, and the Plaintiff was moved to a newly created job. When the Plaintiff was subsequently terminated from his job, the 29 year old employee remained with the company. The court in *Matthewson* noted that:

> Although much of Plaintiff's evidence relates to circumstances surrounding his demotion, it is well settled that evidence of earlier discriminatory conduct by an employer that is time-barred is nevertheless entirely appropriate evidence to help prove a timely claim based on subsequent discriminatory

> conduct by the employer. *Mathewson v. National Automatic Tool Co., Inc* at 91. *See also United Airlines Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 .Ed.2d 1485, 1488.

The *Phelps* decision is therefore in conflict with *Mathewson, Id.* The evidence concerning the transfer, and the pretextual reasons "justifying" it, were also pertinent because the Respondent admitted that it considered allowing Petitioner to bump the newly hired 39 year old secretary at the time of the layoff, but ruled her out due to the alleged confidentiality "problem" and her "inability to relate to third parties" which a reasonable jury could have concluded were pretextual.[11] The Sixth Circuit failed to mention this in its opinion.

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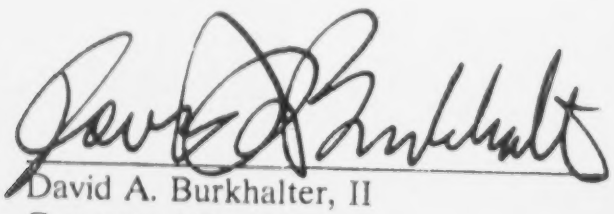
[11]See copy of Defendant's EEOC Position Statement in Appendix at page A-67.

CONCLUSION

The ADEA reflects an important national policy. Discrimination is difficult to prove, and victims of discrimination should not be deprived of jury determination of facts as a result of a cumbersome and artificial framework initially designed for nonjury failure to hire cases, nor should courts freely substitute their own credibility determinations and factual findings for those of a jury. Factual findings and credibility determinations in age discrimination cases should be accorded the same deference given to such findings in other civil cases.

RESPECTFULLY SUBMITTED,



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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 92-5561

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SARAH N. PHELPS,
Plaintiff-Appellant,

v.

YALE SECURITY, INC.,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed February 26, 1993

Before: MARTIN, MILBURN and NORRIS, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. Sarah N. Phelps appeals the judgment notwithstanding the verdict in favor of Yale Security, Inc., in this action under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* Phelps requests that the jury verdict be reinstated. We affirm the judgment of the district court.

Sarah N. Phelps was employed at Yale Security from June 16, 1977 until July 8, 1988, when she was dismissed at age fifty-five pursuant to an alleged reduction in work force. Phelps worked at a plant in Lenoir City, Tennessee, in which Yale Security manufactures

commercial locks and related hardware. Phelps' position at Yale Security changed during her period of employment, but she always remained on the administrative staff as a salaried employee. Between 1977 and 1987, Phelps worked as a secretary for three successive plant managers. She worked for Avery Petty, the last of the three plant managers, for thirteen months until being transferred in November 1987 to work for Ray McCulloch, the factory manager. In McCulloch's office, Phelps' job classification was changed to stenographer although she did not receive a reduction in pay. The reason proffered by Petty for transferring Phelps out of the secretarial job was that he believed that she was divulging confidential information regarding employee salaries. Petty hired a thirty-nine-year-old secretary several months later.

Yale Security laid off Phelps and three other full-time employees on July 8, 1988. Company management made this reduction to meet a goal of a 3-to-1 ratio of direct manufacturing employees to administrative staff. Mike Robinson of Yale Security's human resources department asked the Lenoir City department leaders to determine whether any positions could be eliminated without damaging the efficiency of administrative operations. In response, McCulloch suggested that Yale Security eliminate Phelps' position as a stenographer. McCulloch also eliminated a dispatcher position held by twenty-five year-old David Fickey. The accounting department removed the chief timekeeper position occupied by fifty-three year-old Coy Plemmons. The production planning department eliminated the designer position held by Melvin Pressley, age fifty-six. In addition, Yale Security terminated the temporary employment of twenty-nine year-old Lynn Harvey.

Although Phelps requested a transfer to any available position, Yale Security did not transfer or rehire her or the other two workers in the protected class. Instead, when some openings developed, it rehired the two youngest laid-off workers. In August 1988, Yale Security

created a new dispatcher position and filled two customer service positions. Phelps specifically asked about a dispatcher position at her termination meeting. However, twenty-five year-old David Fickey was rehired as the new dispatcher. Phelps also believed that she was qualified to be a customer service clerk. Nonetheless, Lynn Harvey was rehired as a customer service clerk.

On July 9, 1990, Phelps filed the present action against Yale Security on the basis of age discrimination in regard to her transfer and ultimate discharge. Yale Security filed a motion for summary judgment on April 21, 1991, and the district court denied the motion on June 26, 1991. On November 25, 26, and 27, 1991, the case was tried before a jury. The jury returned a verdict for Phelps and awarded her $121,418 in back pay and future compensation.

On December 12, 1991, Yale Security filed a motion for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b), or, in the alternative, for a new trial. On April 10, 1992, the district court granted Yale Security's motion and entered judgment in favor of Yale Security. The district court also conditionally granted the alternative motion for a new trial in the event that the judgment for Yale Security is reversed. In this timely appeal, Phelps contends that the jury verdict should stand.

This court's standard of review of a judgment notwithstanding the verdict is identical to the standard used by the district court. *Marsh v. Arn*, 937 F.2d 1056, 1060 (6th Cir. 1991). We do not weigh the evidence, evaluate the credibility of the witnesses, or substitute our judgment for that of the jury. *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 154-55 (6th Cir. 1988). Instead, we must view the evidence in the light most favorable to the party against whom the motion is made, and give that party the benefit of all reasonable inferences. *Id.* The motion should be granted, and we should affirm if reasonable minds could not come to a conclusion other than one in favor of the movant. *Id.*

As a starting point, the Age Discrimination in Employment Act declares it unlawful for an employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A plaintiff who brings a claim under the Age Discrimination in Employment Act must prove that age was a determining factor in the adverse action that the employer took against him or her. *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229-30 (6th Cir. 1990) (citations omitted). We recognize, as have all the courts faced with claims of age or sex discrimination, that there is no fixed, easy formula to prove the circumstances of the discrimination. *See Scales v. J.C. Bradford and Co.*, 925 F.2d 901 (6th Cir. 1991); *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987). Such claims generally involve nebulous, circumstantial evidence, but our review must start somewhere.

Sarah N. Phelps' central argument is that age was a determining factor in Yale Security's decision to transfer and/or terminate her. The district court disagreed as do we. In such a case, the plaintiff is required to produce evidence that age was a factor in the employer's decision to discharge the plaintiff and that but for this factor, the plaintiff would not have been discharged. *Chappell v. GTE Products Corp.*, 803 F.2d 261, 265-266, (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987). Phelps contends that she presented sufficient evidence to sustain the verdict when the evidence is viewed in the light most favorable to her. In a discharge case, when the plaintiff lacks direct evidence of discrimination, a plaintiff establishes a prima facie case of age discrimination by showing: (1) he or she was a member of the protected class; (2) he or she was discharged; (3) he or she was qualified for the position; and (4) he or she was replaced by a younger person. *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 69 (6th Cir. 1982). The protected class consists of all individuals of at least forty years of age. 29 U.S.C. § 631. In a case arising out of a work

force reduction, the fourth requirement is modified so that the plaintiff must also demonstrate some "direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Barnes v. Gencorp Inc.*, 896 F.2d 1457, 1465 (6th Cir.), *cert. denied*, 111 S. Ct. 211 (1990).

In *Brownlow v. Edgecomb Metals, Co.*, 867 F.2d 960, 963 (6th Cir. 1989), this court held that it need not review the sufficiency of the plaintiff's prima facie case and that it may instead address the ultimate issue of whether the plaintiff has established discrimination. Therefore, we assume that Phelps established a prima facie case, and we move on to the ultimate question of whether Phelps established that age was a determining factor in Yale Security's actions.

Phelps contends that the business reasons suggested by Yale Security for her transfer and discharge were pretextual. In order to reach this question, one must go through the following analysis. Assuming that a former employee has established a prima facie case of age discrimination, the burden of production of evidence shifts to the employer to articulate some legitimate nondiscriminatory reason for not retaining the employee. *Danielson v. City of Lorain*, 938 F.2d 681, 683 (6th Cir. 1991). In this case, Yale Security asserts that it transferred Phelps because of an alleged confidentiality problem and that it discharged her because it wanted to reach a targeted ratio of manufacturing workers to administrators. Once Yale Security produces legitimate nondiscriminatory reasons, the burden of proof shifts back to Phelps to show that Yale Security's reasons were merely pretexts for age discrimination. *See id.* In the alternative, Phelps argues that even if the nondiscriminatory reasons are accurate, Yale Security had mixed motives and that it would not have discharged her without an additional discriminatory motive. The burden of production shifts throughout this analysis, but the burden of persuasion remains at all times with Phelps.

Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1179-80 (6th Cir. 1983).

In regard to the assertion that she was wrongfully transferred, Phelps' claim is untimely. The district court correctly decided that Phelps did not file a timely charge of age discrimination within 300 days of her transfer in 1987 in accordance with 29 U.S.C. § 626(d).

In regard to the dismissal, Phelps maintains that the ratio-based reason that Yale Security offers for the layoff in 1988 was pretextual. Phelps contends that age was a determining factor in her dismissal as demonstrated by (1) violation of the company's "bumping policy," (2) recalls of younger workers, (3) salary differentials, and (4) her supervisor's age-related comments.

First, Phelps claims that Yale Security did not adhere to a pre-existing policy to protect workers from discharge. Phelps suggests that the failure to follow the policy indicates that the reason for dismissal was merely pretextual. Phelps contends that either of two personnel policies that Yale Security had in place constituted a policy by which she had a right to be transferred before being laid off. The first item suggesting bumping rights is the company's written severance policy. The severance policy indicated that Yale Security would attempt to transfer employees to any open positions before discharging them. There were, however, no job openings at the time of the layoff, and the policy did not create any definitive bumping rights.

The other bumping policy that Phelps describes is an unwritten policy by which Yale Security generally attempted to lay off the less senior of two employees in the same job category. Phelps maintains that her replacement in the plant manager's office had less seniority and should have been laid off before Phelps. Phelps claims that the unannounced reclassification in title from "secretary" to "stenographer" at the time of her

transfer led to her discharge and that she would have otherwise been protected from dismissal.

Phelps' argument assumes that department heads did not select the positions to be eliminated at the department level. There is no evidence, however, that McCulloch or the other heads made the elimination decisions after consulting with anyone outside their respective departments.

The evidence presented by Phelps does not show that a clear bumping policy was in existence at the time of her discharge. Consequently, even when viewing the evidence in the light most favorable to the plaintiff, a reasonable juror might conclude that the bumping evidence does not support the claim that age was a determining factor in Phelps' dismissal because a bumping policy was not in existence.

Phelps also argues that age discrimination occurred when Yale Security rehired the two youngest employees who were laid off in 1988 without rehiring the three workers in the protected class. Yale Security, however, argues that McCulloch and Mike Robinson of the human resources department decided to terminate the employment of Phelps and that Robert Miller, the customer service manager, decided independently to rehire Lynn Harvey. As a result, there was no conspiracy to discriminate based on age.

Yale Security presents a different argument as to the rehiring of David Fickey. The company states that Fickey was rehired to be a dispatcher for a new product line that involved electronics. Fickey had experience in dispatching and electronics. Phelps presents no evidence of electronics experience and some evidence that she had performed some dispatching work in McCulloch's department. However, Yale Security maintains that Phelps lacked the relevant experience that Fickey had for the new position.

The different treatment after the layoff for the two younger workers who were discharged does not reflect that age was a determining factor in the actions taken by Yale Security because various circumstances without relation to age applied to each worker. The rehiring of Harvey was a result of decisions made independently by separate decision-makers. The record does not contain evidence to the contrary. Fickey's experience and Phelps' lack of experience likewise refute Phelps' allegations of age discrimination. Age discrimination cannot be inferred based solely on the ages of rehired workers. *See Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 943-44 (6th Cir. 1987) (holding that statistical evidence of discrimination based on the ages of employees did not have sufficient probative value to establish age discrimination without additional supporting information regarding worker qualifications). Reasonable minds could not come to a conclusion other than one in favor of Yale Security based on this evidence.

Phelps also contends that salary and seniority were in correlation prior to the layoffs and that Yale Security replaced the older, more senior workers in order to take advantage of salary differences. Phelps cites a Seventh Circuit case in order to support her argument. In *Metz v. Transit Mix*, 828 F.2d 1202 (7th Cir. 1987), the Seventh Circuit held that salary savings that would arise after replacing a worker with a younger, lower-salaried employee do not constitute a valid, nondiscriminatory justification for replacement.

Phelps did not demonstrate any seniority-based salary differential for two persons performing the same job. Each position filled after the layoff was different in function and salary range from the positions eliminated. As a result, the differences in salary were based on the differences in the nature of the jobs, rather than on seniority. Phelps did not present any evidence that she would have received a higher salary than Lynn Harvey if Phelps had been rehired instead of Harvey for the customer service job. As a result, salary differentials

could not justifiably lead a reasonable jury to conclude that Yale Security discharged Phelps because of her age.

Phelps presents evidence that McCulloch made some age-related comments about Phelps that she alleges are indicative of age discrimination. First, according to Phelps, McCulloch told Phelps immediately after her transfer to his office in November of 1987 that she was too old to be Petty's secretary and that she would still be the plant manager's secretary if she were younger. Second, McCulloch allegedly told Phelps in December of 1987 that her fifty-fifth birthday that month was a cause for concern. He did not elaborate on what she should fear. McCulloch testified that he did not remember having made either statement.

Age-related comments referring directly to the worker may support an inference of age discrimination. *See McDonald v. Union Camp*, 898 F.2d 1155, 1162 (6th Cir. 1990) (noting that remarks may reflect age bias). However, as Yale Security argues, isolated and ambiguous comments "'are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination.'" *Gagne' v. Northwestern Nat. Ins. Co.*, 881 F.2d 308, 314 (6th Cir. 1989) (quoting *Chappell*, 803 F.2d at 268 n. 2). Because McCulloch made the statements nearly a year before the layoff, the comments were made too long before the layoff to have influenced the termination decision. Moreover, the statement regarding Phelps' birthday was too ambiguous to establish the necessary inference of age discrimination.

In sum, all of the evidence that Phelps produced in support of her claim that Yale Security's reason for the discharge was pretextual fails to establish that age was a determining factor as required by law. *See Blackwell*, 696 F.2d at 1180. (holding that plaintiff in ADEA cases has the ultimate burden of showing that age was a determining factor in the employer's decision in order to establish liability). A plaintiff must prove that age was a factor in the defendant's decision to terminate the

plaintiff, and that but for this factor, the defendant would not have made the decision. *Gagne'*, 881 F.2d at 314 (citation omitted).

Phelps' evidence fails to meet the "but for" requirement. A reasonable jury could not find that Phelps would have been discharged even if Yale Security did not act to reach a 3-to-1 ratio of manufacturing workers to administrators. Likewise, a reasonable jury could not find that Phelps would not have been discharged if she had been younger. As a matter of law, age was not a determining factor in Phelps' discharge. Consequently, the judgment notwithstanding the verdict was proper. Because we affirm the district court's grant of a judgment notwithstanding the verdict, we need not consider Phelps' appeal of the court's conditional grant of a new trial. The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

SARAH N. PHELPS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV. No. 3-90-595
	)	MURRIAN
YALE SECURITY, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This Age Discrimination in Employment Act case was tried before the undersigned and a jury on November 25, 26, & 27, 1991. The jury returned a verdict in favor of the plaintiff. The amount of back pay and fringe benefits was stipulated to be $35,709.00. This amount was doubled because the jury found that the defendant's actions were willful. Also, the jury awarded front pay in the amount of $50,000. Thus, judgment was entered on November 27, 1991 in the total amount of $121,418.

On December 12, 1991, the defendant filed a timely motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial [Doc. 101]. The plaintiff has also moved for approval of her bill of costs and for her attorneys fees

[Doc. 100]. Oral arguments were conducted on these motions on January 9, 1992. The complete trial transcript was filed on January 31, 1992. These motions have been fully briefed and argued and are ready for decision.

This age discrimination in employment action arises out of a reduction in force at defendant's Lenoir City, Tennessee, plant on July 8, 1988. The plaintiff has argued strenuously throughout this litigation that this is not a reduction in force case. Plaintiff's argument is based on defendant's records which show that in plaintiff's category (i.e., salaried employees), there were just as many salaried employees (86) in August 1988 as there were in June 1988. Thus, argues the plaintiff, the reduction in force of five salaried employees on July 8, 1988, was merely a pretext for getting rid of older employees so that younger, less expensive employees could be hired. See Plaintiff's Exhibit 31.

The proof is uncontradicted that the July 8, 1988, reduction in force was triggered by instructions from defendant's home office in Charlotte, North Carolina, directing management

to terminate four salaried employees. Tr. 33-34, 192.[1] These instructions were given to management at the Lenoir City Plant about one week before the decision as to who would be laid off was made. Tr. 192.[2] There is no dispute that the plaintiff (age 55 at that time), Melvin Pressley (age 55 at that time), Coy Plemmons (age 54 at that time), and David Fickey (age 24 at that time) were terminated on July 8, 1988, as a direct result of this directive from the home office. A temporary employee by the name of Lynn Harvey (age 29 at that time) was terminated also per instructions from the home office. Tr. 501. Plaintiff's job title

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[1]Transcript references are to the trial transcript.

[2]Plaintiff's Exhibit 32 indicates that Avery Petty, plant manager at the Lenoir City plant, was questioning in December 1987 whether or not certain "cut back[s]" should be made in "head count." Assuming this refers to employees, it does not specify salaried or non-salaried employees. Moreover, there simply cannot be any dispute that the July 1988 reduction in force was triggered by instructions from the home office in Charlotte, North Carolina, based upon business conditions that developed in 1988, i.e., an imbalance of hourly versus salaried employees.

at the time was stenographer or secretary,[3] Pressley's was that of designer in the engineering group, Plemmon's was that of chief timekeeper in the payroll department, Fickey's was that of dispatcher, and Harvey was a key punch operator.

The plaintiff's position was eliminated on July 8, 1988, and she has never been replaced. Plaintiff attacks as specious or pretextual the business consideration which triggered the layoffs. The undisputed evidence showed that it was defendant's longstanding policy to maintain a ratio of 3.0 to 1.0 of hourly to salaried employees at the Lenoir City plant. The undisputed evidence shows that the ratio dropped to 2.9 to 1.0 in May and June 1988 and that after the July 8, 1988, layoffs, the ratio rose to 3.2 to 1.0 and remained at above 3.0 to 1.0 for the rest of 1988. See Plaintiff's Exhibit 31.

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[3]Company records listed her as a stenographer at the time she was terminated. However, plaintiff produced a "management report" (Exhibit 7), which listed her as a "secretary". The "management report" was produced by an outside corporation for the defendant. In any event, it does not matter for purposes of the instant motion whether her job title was "stenographer" or "secretary" at the time of her termination.

Plaintiff attacks this business consideration because the proof showed that the Lenoir City plant has always been profitable. That is entirely beside the point, however, since the defendant has the prerogative to try and operate its plant as efficiently as possible within the bounds of the law regardless of whether or not the plant is profitable at a given point in time. As explained by Jack Atkins, vice president of human resources for defendant,

> [t]he Lenoir City plant, to my knowledge, has never been unprofitable. Our expenses were out of line with where they should be, and we were working on the operating expense level [in making the reduction in force on July 8, 1988].

Tr. 192. The instruction to terminate four salaried employees and the temporary position in the payroll department came from Mr. Atkins at the Charlotte, North Carolina home office. He let management at the Lenoir City plant decide who would be laid off. The primary decision makers were Ray McCullough, factory manager and plaintiff's immediate supervisor, and Michael Robinson, the Lenoir City plant's employee relations manager.

Tr. 68. The plant manager, Avery Petty, would also have had a "say so" in the decision. Tr. 68.

It is not for the plaintiff or this Court to say that defendant's 3.0 to 1.0 benchmark is wise or unwise. The question is whether or not the decision to terminate this plaintiff was unlawfully motivated by the factor of her age. Blackwell v. Sun Electric Corp., 696 F.2d 1176, 1182 n.7 (6th Cir. 1983).

Reasonable minds could not differ that the plaintiff's termination was in connection with a work force reduction. Her position was eliminated due to business considerations and she was not replaced. This meets the definition of work force reduction in this Circuit as set forth in Barnes v. Gencorp, Inc., 896 F.2d 1457, 1465 (6th Cir.), cert. denied, 111 S.Ct. 211 (1990).

A judgment nov[4] may be granted only if upon viewing the totality of the admissible evidence most favorably to the party opposing the motion, a reasonable trier of fact could draw but one conclusion. All of the evidence must be viewed in a light

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[4]Now known as a motion for judgment as a matter of law. See Rule 50(b), F.R.Civ.P.

most favorable to the plaintiff and all reasonable inferences must be drawn in her favor. If, after that is done, the evidence points so strongly in favor of the defendant that reasonable minds could not come to a different conclusion, judgment nov should be entered in favor of the defendant. Morelock v. NCR Corp., 586 F.2d 1096, 1104-1105 (6th Cir. 1978), cert. denied, 99 S.Ct. 1995 (1979).

Initially, the plaintiff has the burden of establishing a prima facie case of age discrimination. If that is done, a rebuttable presumption of actionable age discrimination arises. That shifts the burden of production (not proof) to defendant to come forth with admissible evidence that defendant's acts were the result of a legitimate, non-discriminatory reason or reasons. If the defendant meets this burden of production, the presumption is rebutted, and plaintiff has the opportunity to prove by a preponderance of the evidence that defendant's proffered reasons were pretextual. Ridenour v. Lawson Co., 791 F.2d 52, 55-56 (6th Cir. 1986).

> The plaintiff retains the burden of persuasion. She must now have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095 (1981). The plaintiff may carry her burden of showing that defendant's proffered reasons are pretextual by showing that (1) the reasons have no basis in fact, (2) or, if they have a basis in fact, that they were not really factors motivating the discharge, (3) or, if they were factors, by showing that they were jointly insufficient to motivate the discharge. Ridenour v. Lawson Co., 791 F.2d at 56.

Work force reduction cases are a little different from cases where a plaintiff is simply discharged and a claim of age discrimination is made. A prima facie case is not made out in the work force reduction situation if plaintiff simply shows that she was in the protected age group (40 or over), that she was

qualified to perform the job, and she was discharged. In addition to these requisites, she must come forth with additional direct, circumstantial or statistical evidence tending to show that she was singled out for discharge for impermissible reasons. Barnes v. Gencorp, Inc., 896 F.2d at 1465. The rationale behind this additional requirement is that the work force reduction itself is the most common legitimate reason for the discharge and therefore no inference of impermissible motivation is established by simply showing that plaintiff was in the protected age group, was qualified to do the job and was discharged. Id.[5]

I will assume for the purposes of this motion that plaintiff made out a prima facie case of age discrimination.

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[5]In a straight discharge case (i.e., not a reduction in work force case), the plaintiff establishes a prima facie case by showing that she was 40 or older, that she was qualified for the job, that she was discharged and that she was qualified for the job, that she was discharged and that she was replaced by a younger person. Barnes v. Gencorp, Inc., 896 F.2d at 1465 n.9. This test is not applied mechanically and the Sixth Circuit has opted for a case-by-case approach that focuses on whether age was a determining factor in the employment decision. Id.

The defendant articulated a legitimate, non-discriminatory reason for the plaintiff's termination. As indicated above, defendant's policy of maintaining a 3.0 to 1.0 ratio of hourly to salaried employees was a longstanding, established policy. Whether that policy is wise or unwise is irrelevant to this lawsuit.

I therefore find that the presumption of impermissible age discrimination resulting from the assumed prima facie case was rebutted. Therefore the question becomes whether or not, after viewing the evidence in a light most favorable to the plaintiff, a reasonable trier of fact could have found that plaintiff met her ultimate burden of persuasion of showing that defendant's proffered reason was a mere pretext and that age was a determining factor in the decision to discharge the plaintiff.

As indicated above, the plaintiff could have met this burden by showing that defendant's proffered reason (1) had no basis in fact, or (2), if it did, it was not the real factor which motivated the discharge, or (3), if it was a factor, the proffered reason was insufficient to motivate the discharge. See Ridenour v. Lawson Co., 791 F.2d at 56.

Reasonable minds could not differ that the 3.0/1.0 policy had a basis in fact. There was not evidence to the contrary. Charles Cox, for whom the plaintiff worked as secretary for nine years, was the plant manager at the Lenoir City plant from August 1976 until February 1986. Tr. 93. In 1986, he was promoted and moved to defendant's home office in Charlotte, North Carolina. He testified that the 3.0/1.0 policy was a management tool utilized during his employment with defendant and agreed that the ratio was monitored on a regular basis and was "one of the manners in which the plant manager was evaluated by the home office." Tr. 111-112. Other witnesses confirmed this. Tr. 41, 84, 111-114, 150-151, 251-252, 434, 438-440, 499-502. The number of hourly employees was determined by product demand and their layoff, bumping and recall rights were part of a collective bargaining agreement. Tr. 86-87, 224-226, 254-255, 439, 499-500.

Since defendant's proffered reason for plaintiff's layoff had a basis in fact, the next question is whether or not it was the real factor which motivated plaintiff's discharge. Plaintiff proved that

three of the five persons selected for termination were in the protected age group. This is too small a sample to have any statistical significance, however. See Haskell v. Kaman Corp., 743 F.2d 113, 121 (2d Cir. 1984). Moreover, the age makeup of the salaried work force both before and after the July 1988 terminations was 62% within the protected age group. Defendant's Exhibit 13. Thus, a termination sample on July 8, 1988, showing three of five (or 60%) within the protected age group creates no suggestion of age bias.[6]

The plaintiff also proved that defendant hired younger salaried employees both before and after plaintiff's termination. It is plaintiff's contention that defendant's failure to hire her into one of these jobs is evidence of age discrimination, with regard to her termination. The proof failed to show, however, that plaintiff was qualified to perform any other job than secretary or stenographer and neither of those positions came open during the period of time that she claims she should have been hired. She

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[6]It is not disputed that one of the three in the protected age category, Mr. Plemmons, requested early retirement and the defendant obliged on July 8, 1988.

had never performed any jobs except secretary and stenographer while in the defendant's employment. Ray McCullough, plaintiff's supervisor when she was terminated, was in the process of training plaintiff for the job of dispatcher, but plaintiff admitted during her testimony that she was not fully trained on that job. Tr. 354. Plaintiff's proof did not establish the characteristics of the pool of applicants from which defendant hired salaried workers. Age discrimination can not be inferred simply from the ages of those hired. Something must be known about the relative qualifications of those hired and the positions to which they were assigned. Also, the fact that younger workers might have been trained after hiring is not probative of whether or not age was a determining factor in the decision to terminate the plaintiff. If no qualified older employees were available or applied for the jobs, hiring younger qualified people would not indicate age discrimination. See Sipson v. Midland-Ross Corp., 823 F.2d 937, 943-944 96th Cir. 1987). The proof showed that the salaried positions into which these younger employees were hired required different qualifications than those of stenographer/secretary. Tr.

507-517. The record does not reveal any failure on defendant's part to hire older persons who were as qualified as the younger persons and who might have been available. Mr. Pressley had worked as a dispatcher at one time, but the proof did not establish that he sought to be rehired after July 8, 1988, or that he was qualified to return to dispatching as of July 8, 1988. Accordingly, no inference of age discrimination can be drawn from the fact that several younger persons were hired into salaried jobs before and after plaintiff was terminated. See Plaintiff's Exhibit 11. The fact that younger persons were hired in at lower starting salaries than plaintiff was making when she was terminated is inconsequential. There is no reason to believe that plaintiff's starting salary in the new jobs would have been any different than those who were hired.

Despite plaintiff's best efforts, she was not able to establish that there was any type of bumping policy which defendant violated in connection with her termination. The jury was charged, in pertinent part, as follows:

> An employer has no duty under the age discrimination law to permit an employee to

> transfer to another position or to displace workers with less seniority when the employee's position is eliminated as a part of a reduction in force.[7]

The only evidence which suggested any kind of bumping rights for a salaried employee is defendant's "Severance Pay Plan for Salaried Employees." It provides, in pertinent part, as follows:

> The Company endeavors at all times to maintain a stable and secure employment situation. However, from time to time, business circumstances may require reductions in the work force. Every effort is made to place the employee, if at all possible, in openings with comparable responsibility and salary. In the event that all placement efforts fail and you are released, you will be granted severance pay to minimize the financial hardship that might occur as a result of a reorganization or a reduction in the work force.

Plaintiff's Exhibit 2.

Contrary to plaintiff's contention in her brief opposing the motion for judgment nov, Jack Atkins did not admit that there was a bumping policy for salaried employees. See Plaintiff's Brief at 30. He said that "a bump is when you take an employee that's in one classification and not really qualified or not having performed work in another classification, another department, you

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[7]Barnes v. Gencorp, Inc., 896 F.2d at 1469.

take that person and bumping [sic] out someone and put them in, start them retraining, that's a bump." Tr. 201. He said that defendant does not bump salaried employees within the same classification. Tr. 199-200. He said that the only company policy is the "Severance Pay Plan for Salaried Employees." Plaintiff's Exhibit 2; Tr. 199. It does not provide for bumping; there must be an opening before a salaried employee will be placed in another job of "comparable responsibility and salary."

The evidence is undisputed that there were no "openings" in the stenographer/secretary classifications when plaintiff was terminated and that she would have required training to move into other salaried positions. In fact, there is no evidence that as of July 8, 1988, any openings with comparable salary and responsibility existed. The defendant was under no obligation to displace younger workers with less seniority who were working in the secretary/stenographer positions in order to avoid a claim of age discrimination. Barnes v. Gencorp, Inc., 896 F.2d at 1469. Also, the positions which plaintiff contends she should have been trained for and hired into after her discharge (customer service

clerk, dispatcher, expeditor) were not open when plaintiff was terminated and later came open for reasons unrelated to the July 8, 1988, reduction in force. See Tr. 215-216, 228-229, 446-447, 458, 480-481, 489-490, 514-515. Also, plaintiff was not qualified to do those jobs. Thus, the evidence did not support a nexus between plaintiff's discharge and age discrimination. See Earley v. Champion Inter. Corp., 907 F.2d 1077, 1083 (11th Cir. 1990).

Certainly it was within the defendant's power to replace less senior employees with the plaintiff or to train he so that she could have moved into a new position, but nothing in the ADEA required such action on defendant's part. Barnes v. Southwest Forest Industries, Inc., 814 F.2d 07, 610 (11th Cir. 1987). Thus, for example, the company could have allowed plaintiff to replace Sarah Lemmons or could have trained plaintiff for the job given Lynn Harvey on August 16, 1988, but nothing in the ADEA required it to do so. "The ADEA only bars discrimination on account of age; it does not place on employers an affirmative obligation to retain older workers whenever a reduction in staff becomes necessary." Wilson v. Firestone Tire & Rubber Co., 932

F.2d 510, 517 (6th Cir. 1991). The defendant acknowledged that the ages of those laid off are considered, but the reason, as stated by defendant's human resources vice president, was to ensure that age discrimination did not occur. Tr. 555-556.

The undersigned allowed plaintiff to introduce several statements allegedly made by Mr. McCullough which plaintiff claims were relevant to intentional age discrimination. In July 1987, the plaintiff was transferred from her position as plant secretary for Avery Petty to the position of stenographer in the manufacturing department. McCullough, age 55, then became her direct supervisor. Plaintiff testified that after her transfer McCullough, age 55, then became her direct supervisor. Plaintiff testified that after her transfer McCullough stated to her "You're too old to be Mr. Petty's secretary ... if you were younger, you would still be Mr. Petty's secretary." Tr. 292. She also said that in August or September 1987, McCullough said "You're too old for Petty ... you ought to be about twenty." Tr. 309. Just after her birthday on November 29, 1986, plaintiff testified that during a meeting

> ... a statement was made about my birthday, and I said, "Yes, I had a big one. It was my 55th birthday." I said, "Do I need to start worrying about that, Ray?" And he said, "Absolutely." And then Ray said, "My birthday is in November also, and I was 54, and I'm concerned about my age. I don't know whether I'll make it to sixty or not."

Tr. 310. Mr. McCullough testified that he did not recall making the statements but if he did make the remark about her birthday, it was in a joking manner. Tr. 484-486. Of course, for purposes of the instant motion, I must assume that the jury believed the remarks were made.

These statements were isolated and ambiguous remarks that undoubtedly were prejudicial to the defendant. See Gagne v. Northwestern National Insurance Co., 881 F.2d 309, 314 (6th Cir. 1989). Without question, McCullough was a decision maker in regards to plaintiff's termination on July 8, 1988; however, the remarks concerning being too old to be Petty's secretary do not relate to the position from which she was terminated - stenographer in the manufacturing department. The undisputed proof showed that McCullough tried to help plaintiff avoid

termination by attempting to train her for the position of dispatcher.

The statements were made between eight months and a year before plaintiff was terminated and the remark concerning plaintiff's birthday is too ambiguous to support any inference of age bias.

Plaintiff argues that Petty transferred plaintiff to a layoff-prone position in July 1987, i.e., stenographer in the manufacturing department, and therefore the statements concerning Petty were relevant. That transfer is not the subject of this lawsuit, however. Any such action would be time barred. Plaintiff admits in her brief in response to the instant motion that she was told it was a layoff-prone position shortly after she was transferred there. Moreover, there is direct evidence of why that transfer occurred. Mr. Petty said he moved plaintiff out of the job as his secretary because he came to believe she was divulging confidential information concerning employee salaries. Tr. 255-256. Charles Cox, a witness called on plaintiff's behalf, verified that Petty told him at the time plaintiff was transferred from the

plant secretary job that plaintiff had leaked confidential salary information. Tr. 166. Mrs. Phelps denied leaking the information and said that the only time Petty reprimanded her was when he thought she had disobeyed his instructions not to tell anyone where he was on a given occasion. Tr. 329. The president of the company apparently telephoned from Charlotte and located Petty at the nurses' station and Petty believed that plaintiff had given him Petty's location in the plant despite Petty's instructions to the contrary. Regardless of who the jury believed, plaintiff or Mr. Petty, the proof showed that their working relationship broke down for reasons unrelated to plaintiff's age.

The comments relating to plaintiff's transfer in July 1986 from plant secretary for Mr. Petty to the position of stenographer in the manufacturing department do not relate to the desirability of keeping or not keeping the plaintiff in the latter job. Her selection for discharge in July 1988 was made primarily by McCullough and Mike Robinson with Avery Petty having a "say so."

The remarks simply do not lead to any inference that McCullough, Robinson or Petty treated plaintiff's age as a factor regarding her July 1988 termination from the position of stenographer.

Avery Petty hired a thirty-nine year old female secretary several months after he transferred plaintiff to the stenographer's job and there was evidence that the stenographer's position was vulnerable to layoffs. Tr. 22. The plaintiff never pursued a timely claim of age discrimination regarding this transfer even though she testified that Mr. McCullough made remarks to her shortly after her transfer that her age had motivated Petty to transfer her.

The decision to eliminate the position of stenographer was primarily by Messrs. McCullough and Robinson. Tr. 36, 68, 176. None of the remarks attributed to Mr. McCullough reflect any bias against plaintiff by McCullough or Petty on account of her age in connection with her position of stenographer in the manufacturing department. Plaintiff presented no evidence that had she been younger, Messrs. Robinson and McCullough would

have selected a different position for termination in July 1988. Also, there is no evidence to indicate that Mr. Petty did anything but go along with the recommendation of the primary decision makers, McCullough and Robinson, in connection with plaintiff's July 1988 termination.

Reasonable minds must conclude that defendant's proffered reason for plaintiff's discharge had a basis in fact, it was the real factor which motivated the discharge and it was a sufficient reason for motivating the discharge. The plaintiff therefore failed to carry her ultimate burden of showing that the proffered reason was pretextual in nature.

For the reasons indicated, the undersigned finds and concludes that even when all of the evidence is viewed in a light most favorable to the plaintiff, a reasonable trier of fact must conclude that plaintiff did not carry her ultimate burden of proving that defendant's proffered reasons for discharging plaintiff were merely pretexts for unlawful age discrimination. Accordingly, defendant's motion for judgment nov (as a matter of

law) will be granted, judgment shall enter in defendant's favor and plaintiff shall take nothing on her claim.

Pursuant to Rule 50(b)(1), F.R.Civ.P., the defendant's motion for new trial is granted should this judgment be vacated or reversed. The statements attributed to Mr. McCullough by plaintiff regarding her age being a factor in Mr. Petty's transfer of plaintiff in July 1987 and regarding her 55th birthday should not have been admitted into evidence. As indicated above, they were isolated, ambiguous remarks which lacked probative value. Rule 401, F.R.Evid. Even if it is assumed that they had some probative value, that value was substantially outweighed by the resulting prejudice to the defendant. Rule 403, F.R.Evid. Admitting them affected defendant's substantial rights and was not harmless error. Plaintiff's application for costs, including attorneys fees, will be denied as moot.

Order accordingly.

File:

(signature on original)

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Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

SARAH N. PHELPS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV. No. 3-90-595
	)	(MURRIAN)
YALE SECURITY, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM

During the course of trial, a question arose as to the admissibility of certain statements allegedly made by Ray McCulloch to the plaintiff. The plaintiff was on the witness stand and said that McCulloch told her after she was transferred from the position of plant manager's secretary (under Mr. Avery Petty) words to the effect that if she had been younger she would still be Avery Petty's secretary; that "you are too old to be Mr. Petty's secretary"; and "you oughta be about 20." An objection was raised to these answers and the jury was excused. The undersigned allowed the answers to stand after a hearing.

There is really no dispute that Ray McCulloch was a decision-maker with regard to plaintiff's termination on or about July 8, 1988. The defendant argues that the statements have nothing to do with her termination but rather relate to her transfer from the position of secretary to Mr. Petty, the plant manager, to the position of stenographer, where she worked under the supervision of McCulloch. The defendant points out that this claim is not being made and further more would be time-barred.

The undersigned is of the opinion that these statements may have some relevance because there is evidence in this record that Ray McCulloch, Mike Robinson, and Avery Petty all participated in the decision, at least to some extent, to terminate the plaintiff in July of 1988. The statement may have some probative value with regard to Mr. McCulloch's state of mind regarding the treatment of older persons at the plant. It also may have probative value regarding Mr. Petty's treatment of older persons versus younger persons. See Normand v. Research Institute of America, Inc., 927 F.2d 857, 864 (5th Cir. 1991). The

statement comes in as an admission under Rule 801 (d)(2)(D), Federal Rules of Evidence. Normally, under the Rules of Evidence, such a statement may be admitted even though it does not involve first-hand knowledge and even though it contains an opinion or a conclusion. McCormick on Evidence, § § 263, 264 (3d ed. 1984). This is a concomitant of the adversary system and, of course, the defendant is free to try to rebut or explain the statement.

I find that the jury could logically and reasonably believe that these statements were connected to plaintiff's termination. According to defendant's Vice-President of Human Resources, Jack Atkins, the job to which plaintiff was transferred in July, 1987 (stenographer) was "vulnerable" to layoff. Mr. McCulloch testified that the stenographer's job had been eliminated several times. It had been vacant for about two years when plaintiff was moved into it. Therefore, there is evidence from which the jury could conclude that such a transfer logically and reasonably led to her layoff in July, 1988, especially since there is evidence that Mr Petty and Mr. McCulloch were decision-makers in that

termination. Mr. Petty hired a 39-year-old woman to replace the plaintiff several months after plaintiff was transferred.

FILE:

(signature on original)

Robert P. Murrian
UNITED STATES MAGISTRATE JUDGE

III. STATEMENT OF FACTS

The Plaintiff was first hired by the Defendant as secretary on June 16, 1977. (Sarah Phelps at TR 278.) She remained continuously employed at the Defendant's Lenoir City, Tennessee plant until she was terminated on July 8, 1988, at age 55, pursuant to an alleged "reduction in work force." (Ex. 3, Separation Notice: Phelps.) At the time of termination, Plaintiff was secretary to Ray McCulloch,[8] Factory Manager, and she was in good health. (Ray McCulloch at TR 172, 176; Sarah Phelps at TR 277.) The Defendant asserted that the "reduction in force" was "economically justified," even though the Lenoir City plant was profitable and Defendant was going through major acquisitions. (Jack Atkins at TR 190, 192; Avery Petty at TR 255; Ex. 18, Thompson letter to EEOC: 09/27/89.) The Defendant asserted Plaintiff was let go pursuant to a "reduction in force" even though it had a total of 439 employees at the Lenoir City plant in June before the "reduction in force," it had a total of 439

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[8] Spelled "McCullough" by Court Reporter.

employees in July after the "reduction in force," and its total work force had increased to 452 by August.[9] (Ex. 1, Enumeration reports.) Plaintiff was a salaried employee, and Defendant had 83 salaried employees in January, 1988, 86 salaried employees in June and had 86 salaried employees in August, one month after the "reduction." (Ex. 1, Enumeration reports.)

For the vast majority of the Plaintiff's career, she was the secretary for the Plant Manager. (Sarah Phelps at TR 280-281.) Defendant considered this a "clerical" position. (David Burkhalter at TR 169.) The Plaintiff received a merit raise each year of her employment. (Ex. 33, Summary of raises, with attached Personnel Action Records.) The Plaintiff was evaluated annually, and on most of her appraisals, she was recommended for promotion. (Ex. 21-30, Phelps appraisals: 12/19/77 through 10/23/87.) During her employment, she was appraised by three different supervisors and she received three "satisfactory" appraisals and seven "above average" appraisals. (Ex. 21-30, Phelps appraisals: 12/19/77

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[9] The Defendant had approximately 2,000 employees internationally, of which, approximately 1,000 were located within the United States. (Jack Atkins, p. 188.)

through 10/23/87.) A review of some of the remarks on her annual appraisals gives an idea of the type of employee she was:

1977 Under general remarks: "Good employee -- Dedicated and loyal to plant and its management." (Ex. 29, Phelps appraisal: 12/19/77.)

1978 Under strong points: "Willingness to perform in an outstanding manner. Cooperativeness. Self improvement."

Under general remarks: "Fits in perfectly." (Ex. 28, Phelps appraisal: 06/20/78.)

1979 Under strong points: "Cooperativeness, accuracies [sic], and experience." (Ex. 27, Phelps appraisal: 06/01/79.)

1980 Under general remarks: "Excellent employee." (Ex. 26, Phelps appraisal: 05/28/80.)

1981 Under strong points: "Knowledge of job, mental alertness, and ability to inspire and get along well with others." (Ex. 25, Phelps appraisal: 05/28/81.)

1983 Under strong points: "Excellent employee -- anxious and willing to help or improve." (Ex. 24, Phelps appraisal: 10/04/83.)

1984 Under strong points: "Experience is major factor. Willingness to be best at job assigned." (Ex. 23, Phelps appraisal: 09/26/84.)

1985 Under strong points: "Loyalty, consistent [sic] quality work."

Under general remarks: "An excellent employee." (Ex. 22, Phelps appraisal: 10/10/85.)

1986 Under strong points: "She has good knowledge of her job and those of other areas." (Ex. 30, Phelps appraisal: 10/01/86.)

1987 Under strong points: "Sarah has good knowledge of her job. Also other areas of the Plant."

Under general remarks: "Since Sarah has been in this job she has done a top notch job." (Ex. 21, Phelps appraisal: 10/23/87.)

For most of her career at Defendant, she worked as secretary for Charles Cox, Plant Manager, and he testified on her behalf at trial. Cox was Plant Manager from August, 1976, until February, 1986. (Charles Cox at TR 93.) Cox was promoted to Coordinator of Special Projects in 1986, and Avery Petty became Plant Manager.[10] (Charles Cox at TR 98, 102; Avery Petty at TR 243.) Cox returned to the Lenoir City plant as "Interim

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[10] Petty testified he became Plant Manager in 1985, but Cox stated he was not promoted until 1986 and Cox signed the 1985 appraisal. (Avery Petty, p. 243; Charles Cox, p. 98; Ex. 22, Phelps appraisal: 10/10/85.)

Operations Manager" in 1988 after the layoff and Petty had reporting duties to him. (Charles Cox at TR 102.) In 1989, Cox was promoted to Vice President of Administration. (Charles Cox at TR 92, 99.)

At some time in the summer of 1987,[11] Avery Petty moved Plaintiff (at age 54) from the Plant Manager's secretary's office to another office and Ray McCulloch, Factory Manager, became her direct supervisor. (Ray McCulloch at TR 172, 176.) The Plaintiff continued to do work for the Plant Manager even after she was moved. (Sarah Phelps at TR 285.) The Plaintiff was told that she was moved in order to implement new reports, and they needed her in the new position, but she would continue to do work for the Plant Manager. (Sarah Phelps at TR 281-284.) The Plaintiff initially considered it a promotion, and in fact received a raise in November of 1987. (Sarah Phelps at TR 283-284; Ex. 33, Summary of raises, with attached Personnel Action

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[11] In Defendant's Position Statement submitted to the EEOC, Defendant took the position that Plaintiff was transferred on November 16, 1987. (Ex. 19, Thompson letter to EEOC: 02/23/90.) The Plaintiff's recollection was that she was transferred prior to that date. (Sarah Phelps, p. 389.)

Records.) Petty told Cox he was not going to fill the secretary position. (Charles Cox at TR 165-166.) However, on September 1, 1987, Defendant hired a new secretary, Sara Lemmons[12] (age 39). (Ex. 12, Personnel Action Record: Sara Lemmons.) Sara Lemmons had been communicating with Avery Petty for at least a couple of years concerning employment with the Defendant, and she would periodically visit him at the plant and call him. (Sara Lemmons at TR 270-271.) Petty called Lemmons after he moved Plaintiff, and she interviewed for a secretary position and was told to call him later at his home, and she was offered a job. (Sara Lemmons at TR 271.) At some point after the transfer, the Plaintiff was told by her new supervisor that she had become "excess baggage" and she was in a layoff-prone position. (Sarah Phelps at TR 290.) Avery Petty testified he transferred her because he felt she had talked about salaries or raises in the ladies' room. The Plaintiff was not written up for this, and the alleged incident of her discussing salaries was the only criticism Petty ever had of her, and he testified he talked to Plaintiff about

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[12] Spelled "Lemons" by Court Reporter.

this at least once. (Avery Petty at TR 255-257.) The Plaintiff denied she ever divulged or discussed salaries, and denies an alleged problem with confidentiality of salaries was discussed with her at any time. (Sarah Phelps at TR 286-288.) The Plaintiff did admit that Petty at one point initially believed she had told the President of the Defendant that he could be found with the Plant Nurse at her work station, contrary to his instructions to her not to reveal his whereabouts, but she did not tell the President where Petty was to be found. (Sarah Phelps at TR 286-288.) Cox and McCulloch testified they had no problem with her handling confidences. (Charles Cox at TR 110-111; Ray McCulloch at TR 174.) Mr. Petty testified he was "pleased" with the Plaintiff's work and rated her satisfactory. (Avery Petty at TR 257; Ex. 30, Phelps appraisal: 10/01/86.) In fact, Petty approved a raise for Plaintiff after the transfer. (Ex. 33, Summary of raises, with attached Personnel Action Records, p. 14.)

After Lemmons was hired, an employee action record was allegedly created for Sarah Phelps, dated November 16, 1987, at

which time she received a merit increase of $100.00 per month, and after ten years of being classified as a "secretary," her job title allegedly was changed to "stenographer." (Ex. 33, Summary of raises, with attached Personnel Action Records, p. 14.) However, the Plaintiff did not discover the alleged job title change until after her termination, and in fact on the Defendant's Job Title Listing Report for June, 1988, Plaintiff's position is still shown as a "secretary." (Sarah Phelps at TR 324; Ex. 7, Job Title Listing Report: 06/30/88.) Also, her last supervisor, McCulloch, regarded her as a "secretary." (Ray McCulloch at TR 176.) A "To Do List," typed and distributed by secretary Sara Lemmons on December 9, 1987, from the Plant Manager to the Plaintiff's new supervisor, McCulloch, with a copy going to the company President, is significant in two ways. (Sara Lemmons at TR 273; Jack Atkins at TR 186; Ex. 32, Inter-office Correspondence: 12/09/87.) First, it demonstrates Defendant was considering a reduction of the "headcount" as early as December 9, 1987. (Ex. 32, Inter-office Correspondence: 12/09/87.) Second, the one-page memo reveals misspellings, typing errors, and grammar

mistakes made by the new secretary. (Ex. 32, Inter-office Correspondence: 12/09/87.)

At some time after the Plaintiff was transferred to Ray McCulloch's supervision, she was informed by him that she was in a position susceptible to layoff, because it had been eliminated in the past. (Sarah Phelps at TR 289-290.) Jack Atkins, Vice President of Human Resources, also testified the position was a "vulnerable position." (Jack Atkins at TR 186, 222.) In fact, this was a position that Robinson, Employee Relations Manager, recommended for elimination because it had been eliminated in the past. (Mike Robinson at TR 32, 47.) Due to the fact that Plaintiff was in a layoff-prone position, her supervisor, McCulloch, undertook to train Plaintiff as a dispatcher so she would have a position to move into when they eliminated her position. (Sarah Phelps at TR 289-291.) Plaintiff had previously been recommended for promotion to a dispatcher job or planning job. (Avery Petty at TR 259; Ex. 30, Phelps appraisal: 10/01/86.) McCulloch had been instructed in December of 1987 to consider which positions could be eliminated. (Ex. 32, Inter-office

Correspondence: 12/09/87.) One of the dispatchers, Dorothy Graves, was planning on retiring, and Plaintiff was being trained for her job. (Sarah Phelps at TR 291; Ray McCulloch at TR 181-182.) Graves did retire effective April 1, 1988, but for reasons never explained, Plaintiff did not get the job and the record discloses that two young dispatchers were hired shortly thereafter: Monger (age 32) and Fickey (age 24). (Ex. 4, Separation Notice: Fickey; Ex. 7, Job Title Listing Report: 06/30/88; Ex. 8, Quarterly Wage and Salary Report: 09/30/88; Ex. 13, Personnel Action Record: Jerry Monger.) McCulloch testified that Plaintiff was very intelligent, and trainable, and was doing fine with the dispatching work she was doing and he admitted that some people have worked twenty years in the position and did not fully know it. (Ray McCulloch at TR 181-182, 487-489.) Cox testified she was qualified for a dispatcher position. (Charles Cox at TR 110.)

The proof showed the Defendant was hiring salaried employees in 1987 and 1988, all of whom were younger than the

Plaintiff.[13] (Ex. 11, Employees hired 01/01/87 to 04/15/89.)

These employees included:

1. Sara Lemmons (date of birth July 9, 1948; date of hire September 1, 1987), was hired as a "Secretary." (Ex. 7, Job Title Listing Report: 06/30/88; Ex. 12, Personnel Action Record: Sara Lemmons.)

2. Robert Robinette (date of birth August 11, 1957; date of hire September 28, 1987), was hired as a "Dispatcher." (Ex. 7, Job Title Listing Report: 06/30/88.)

3. Jerry Monger (date of birth January 24, 1956; date of hire May 23, 1988), was hired as a "Dispatcher." (Ex. 7, Job Title Listing Report: 06/30/88; Ex. 13, Personnel Action Record: Jerry Monger.)

4. Rick Moore (date of birth June 8, 1958; date of hire June 20, 1988 and/or August 1, 1988), was hired as a "Customer Service Expeditor." (Ex. 8, Quarterly Wage and Salary Report: 09/30/88; Ex. 14, Personnel Action Record: Rick Moore.)

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[13] The Defendant's records contained contradictory dates and job titles which had been provided to EEOC. (Ex. 7, Job Title Listing Report: 06/30/80; Ex. 8, Quarterly Wage and Salary Report: 09/30/88.) Also, the records were misleading because Defendant used an original hire date for an employee who allegedly had been "rehired," but Defendant had no written policy about "rehiring" salaried employees. (Avery Petty at TR 250; Ex. 7, Job Title Listing Report: 06/30/80; Ex. 8, Quarterly Wage and Salary Report: 09/30/88.) It is therefore difficult to determine exact hire dates from the records presented by Defendant.

5. Lynn Harvey (date of birth March 2, 1959; date of hire August 16, 1988), had originally been a "temporary" employee hired in March 1988 and worked in data processing. (Mike Robinson at TR 53-54, 60; Ex. 8, Quarterly Wage and Salary Report: 09/30/88; Ex. 9, Personnel Action Record: Lynn Harvey.)

6. David Fickey (date of birth September 4, 1963; original date of hire as a "Dispatcher" May 16, 1988). (Ex. 7, Job Title Listing Report: 06/30/88.)

The Defendant admitted that the positions for which Lemmons, Moore, and Harvey were hired were considered "clerical." (David Burkhalter at TR 169.)

The following employees were "laid off" on July 8, 1988:

Name	Date of Hire	Position	Age as of 07/08/88
Phelps, Sarah	08/16/77	Secretary	55
Fickey, David	05/16/88	Dispatcher	24
Pressley, Melvin	08/21/56	Designer	56
Plemmons, Coy	06/16/54	Timekeeper	53
Harvey, Lynn	03/88	Temporary Emp.	29

(Mike Robinson at TR 47-48; Ex. 3, Separation Notice: Phelps; Ex. 4, Separation Notice: Fickey; Ex. 5, Separation Notice: Pressley; Ex. 6, Personnel Action Record: Coy Plemmons; Ex. 7,

Job Title Listing Report: 06/30/88; Ex. 9, Personnel Action Record: Lynn Harvey.) At the layoff, Plaintiff and Pressley asked for other positions, and both wanted to remain employed. (Sarah Phelps at TR 260, 313, 319-320; Melvin Pressley at TR 418-420; Ex. 38, Letter to McCord: 08/02/88.) The proof showed that Coy Plemmons (age 53), Melvin Pressley (age 56), and Sarah Phelps (age 55) were not recalled or rehired by the Defendant and that Pressley and Phelps were not considered for any other positions. (Mike Robinson at TR 74, 81; Jack Atkins at TR 223-224; Ex. 11, Employees hired 01/01/87 to 04/15/89.) Plaintiff specifically asked about a dispatcher position at her termination meeting. (Sarah Phelps at TR 313.) Plaintiff wrote a letter dated August 2, 1988 to the President of the Defendant requesting reinstatement, with a copy going to the Human Resources Manager, Mike Robinson. (Ex. 38, Letter to McCord: 08/02/88.) The proof was unclear as to whether Coy Plemmons wanted to be "laid off" as asserted by Defendant and as accepted by the Magistrate, since he was not called as a witness, but his termination notice clearly stated "Released/Involuntary Early Retirement -- position eliminated due

to reduction in work force." (Ex. 6, Personnel Action Record: Coy Plemmons; R. 120, Mem. Opin., at P. 9.) The same language was on Melvin Pressley's and Sarah Phelps's termination notices. (Ex. 3, Separation Notice: Phelps; Ex. 5, Separation Notice: Pressley.) The "decision makers" for this layoff were Robinson, McCulloch, and Petty, and Atkins had the final review. (Mike Robinson at TR 33-36; Ray McCulloch at TR 175-176; Jack Atkins at TR 189.) Plaintiff's supervisor at the time of the layoff could remember no specific details of the layoff. (Ray McCulloch at TR 175.) Atkins testified at trial he has a "good recollection" of the lay off but in his deposition, he admitted he traveled 60% of the time, and that he only had a "vague recollection." (Jack Atkins at TR 565-567.)

The proof showed that Lynn Harvey (age 29) was back at work in Data Entry within two weeks of the "layoff," and she was given the "clerical" position of Customer Service Clerk on August 16, 1988. (Mike Robinson at TR 60; David Burkhalter at TR 169; Ex. 9, Personnel Action Record: Lynn Harvey.) She was previously in data entry, and her resume did not suggest any

customer service background. (Ex. 9, Personnel Action Record: Lynn Harvey.) The proof showed that while Plaintiff was Plant Manager's secretary, she had some duties in connection with Customer Service related to handling calls directed to the Plant Manager from irate customers and suppliers, and in fact had worked for a previous employer as a Customer Service Clerk. (Sarah Phelps at TR 281; Ex. 33, Summary of raises, with attached Personnel Action Records, p. 3, 4.) Plaintiff was qualified for a customer service position. (Charles Cox at TR 110; Ray McCulloch at TR 183.) In fact, Defendant admitted that she was qualified for the position and that it considered her for the position. (Ex. 19, Thompson letter to EEOC: 02/23/90.) The Defendant asserted that Plaintiff was ruled out for a Customer Service job because:

> Concededly Mrs. Phelps had the ability to perform the typing, filing, and record keeping aspects of the Customer Service Clerk position. However, the position also requires direct customer contact and because it was felt Mrs. Phelps lacked the ability to relate to third persons in the manner the company insisted was necessary, it was determined that she would not have been a good candidate for the Customer Service Position."

(Ex. 19, Thompson letter to EEOC: 02/23/90.) [Emphasis added.]

Not a single witness at trial testified that Plaintiff had a problem relating to third persons, but to the contrary, all witnesses testified that she related well to third parties.[14] (Charles Cox at TR 110; Avery Petty at TR 258; Ray McCulloch at TR 174-175.) Following the "reduction," the Defendant had the following employees in the customer service department in clerical positions:

Name	Date of Birth	Position	Age as of 08/16/88
Harvey, Lynn	03/02/59	Clerk/Customer Service	29

[14] The Equal Employment Opportunity Commission (EEOC) issued a determination on May 31, 1990 that the evidence obtained did not establish a violation of the act; however, EEOC accepted Defendant's unsubstantiated assertion concerning Plaintiff's ability to relate to third parties. (Ex. 20, EEOC determination: 05/31/90.) The EEOC also determined that the "reduction in force" involved 28 people, when only 5 were involved, and the EEOC was not told about Lynn Harvey being laid off and immediately recalled. (Jack Atkins at TR 587-590; Ex. 20, EEOC Determination; Ex. 1, Enumeration Reports; Ex. 36, List of terminations.) The EEOC also determined that Plaintiff was not suitable for Plant Manager Secretary due to her inability "to handle confidential information" and her "demonstrated inability to relate to others." (Ex. 20, EEOC Determination.) The EEOC also determined she was not suitable for the customer service position due to her inability to relate to third persons. (Ex. 20, EEOC determination.)

Moore, Rick	06/08/58	Expeditor	30
Robinette, Susan	04/29/54	Expeditor	34

(Avery Petty at TR 265-266; Ex. 8, Quarterly Wage and Salary Report: 09/30/88; Ex. 14, Personnel Action Record: Rick Moore.) The Defendant hired Rick Moore (age 30) either on June 20, 1988 and/or August 1, 1988. (Ex. 8, Quarterly Wage and Salary Report: 09/30/88; Ex. 14, Personnel Action Record: Rick Moore.) The Defendant shifted Susan Robinette (age 34) from being a clerk in production control to the Expeditor position in customer service on or before August 1, 1988, and gave her a raise. (Ex. 7, Job Title Listing Report: 06/30/88; Ex. 15, Personnel Action Record: Susan Robinette.) The decision-makers for a transfer would be Robinson and Petty. (Mike Robinson p. 68.) Defendant considered these clerical positions and Plaintiff was qualified for the positions. (David Burkhalter at TR 169; Charles Cox at TR 110, 126; Ray McCulloch at TR 183.) In its position statement to the EEOC, Defendant represented that: "...the Customer Service Department to which Harvey and Moore were hired did not even exist at the time of the reductions in force."

(Ex. 18, Thompson letter to EEOC: 09/27/89.) However, various witnesses, including past plant manager Charles Cox and Ray McCulloch established that Defendant always had a Customer Service Department. (Charles Cox at TR 97; Ray McCulloch at TR 180.) The Defendant hired Robert Robinette (age 31) on September 28, 1987 as a dispatcher in the Customer Service Department, and it hired Jerry Monger (age 33) on May 23, 1988 as a dispatcher in the Customer Service Department. (Avery Petty at TR 256-266; Ex. 7, Job Title Listing Report: 06/30/88; Ex. 8, Quarterly Wage and Salary Report: 09/30/88; Ex. 13, Personnel Action Record: Jerry Monger.)

David Fickey (age 24) was back at work as a dispatcher as of the first of August, 1988 and he had to be trained for this new position. (Mike Robinson at TR 71-72; Ex. 10, Personnel Action Record: David Fickey.) At trial, Defendant asserted McCulloch had specifically requested that Fickey be recalled from layoff, but McCulloch contradicted this and testified he did not ask specifically for Fickey. (Mike Robinson at TR 69-70; Jack Atkins at TR 215; Ray McCulloch at TR 178.) The Plaintiff was

qualified for a dispatcher position. (Charles Cox at TR 110; Ray McCulloch at TR 182-183.)

The proof in this case showed also that after the Plaintiff was moved into the layoff-prone position under Ray McCulloch's supervision, "decision-maker" McCulloch made age-conscious statements to the effect that "if you were younger you would still be Mr. Petty's Secretary," "you're too old to be Mr. Petty's secretary," and "you're too old for Petty," (Sarah Phelps at TR 292-309.) These comments occurred in August or September. (Sarah Phelps at TR 309.) McCulloch admitted to Plaintiff that they had "older" women in her position before and "that they've had to be retired." (Sarah Phelps at TR 290.) Additionally, there was proof that shortly after the Plaintiff's 55th birthday (date of birth November 29, 1932), she asked Mr. McCulloch if she should be concerned about her age in the context of continued employment, and he said, "[a]bsolutely," and they were all concerned about their ages, and he didn't know if he would last there until he was 60. (Sarah Phelps at TR 310.) In fact, the date of this last conversation was during the time period Plaintiff's

supervisor received the memorandum concerning potential "headcount" reductions. (Ex. 32, Inter-office Correspondence: 12/09/87.) All of these remarks were made during the last year of her employment by her direct supervisor after Plaintiff had been moved into a lay off prone position, and McCulloch clearly was a decision-maker, as was Petty. (Mike Robinson at TR 68; Ray McCulloch at TR 175-176.) McCulloch had also been directed to consider head count reductions. (Ex. 32, Inter-office Correspondence 12/04/87.) Also, both Atkins and Robinson (decision-makers) admitted that they considered the ages of the employees in making the layoff decisions involving Plaintiff and Pressley. (Mike Robinson at TR 68, 75; Jack Atkins at TR 199.) Atkins later asserted this was done to make sure there was no discrimination. (Jack Atkins at TR 555-556.)

The Defendant admitted that the Plaintiff was not considered for any other position at the time of her termination or when the Defendant started filling positions immediately before or immediately after the termination, and neither was Melvin Pressley. (Mike Robinson at TR 46, 74; Jack Atkins at

TR 223-224.) The proof also showed that Melvin Pressley was a satisfactory employee, he did an "incredible" job according to Plant Manager Petty, and he had worked for two years as a dispatcher. (Avery Petty at TR 255; Melvin Pressley at TR 419.) Robinson asserted that the decision-makers for those hired immediately after the lay off were allegedly Robinson and Petty, but Petty contradicted this and denied he was involved in the decision to hire Lynn Harvey. (Mike Robinson at TR 67; Avery Petty at TR 267.)

The proof showed that other young employees were promoted and shifted into different positions at or about the time of this layoff, including Susan Robinette (age 34), who was promoted from Clerk to Expeditor (a clerical position) in the Customer Service Department effective August 1, 1988, and Robert Cox (age 37), who was shifted (with a raise) from Dispatcher to Planner-Product. (Mike Robinson at TR 67; Avery Petty at TR 267-268; David Burkhalter at TR 169; Ex. 7, Job Title Listing Report: 06/30/88; Ex. 8, Quarterly Wage and Salary Report: 09/30/88; Ex. 13, Personnel Action Record: Jerry Monger;

Ex. 15, Personnel Action Record: Susan Robinette.) Plaintiff had previously been recommended for promotion to dispatching or planning. (Avery Petty at TR 259; Ex. 30, Phelps appraisal: 10/01/86.) The proof also showed that the Defendant was supposed to lay off its temporary employees first, and in fact did lay off Lynn Harvey on July 8, 1988, but did not lay off another temporary employee, Amanda Victor Rainey (date of birth September 22, 1948), and she retained her job. (Mike Robinson at TR 60; Jack Atkins at TR 195; Ex. 8, Quarterly Wage and Salary Report: 09/30/88.)

There was no written documentation concerning this alleged "reduction in force." (Mike Robinson at TR 36.) The only pertinent written policy for salaried employees stated in pertinent part as follows:

> "The company endeavors at all times to maintain a stable and secure employment situation. However, from time to time, business circumstances may require reductions in the work force. Every effort is made to place the employee, if at all possible, in openings with comparable responsibility and salary. In the event that all placement efforts fail, and you are released, you will be granted severance pay to minimize the financial hardship that might occur as a result of a reorganization or

> a reduction in the work force." (Ex. 2, Severance Plan.) [Emphasis added.]

The proof showed that the Defendant, even though it was hiring younger employees immediately before and at or about the time of the layoff, made no effort to place Plaintiff or Pressley even though they both were qualified, and even though Defendant was considering reductions in the headcount at least as early as December 9, 1987. (Mike Robinson at TR 74; Jack Atkins at TR 223-224; Ex. 32, Inter-office Correspondence: 12/09/87.) The Defendant hired Monger (age 33) as a Dispatcher on May 23, 1988, and David Fickey (age 24) as a Dispatcher on May 16, 1988. (Ex. 7, Job Title Listing Report: 06/30/88; Ex. 8, Quarterly Wage and Salary Report: 09/30/88.) The Defendant asserted there were "no openings" on July 8, 1988. (Jack Atkins at TR 196, 220.) A reasonable jury could conclude that Defendant did have openings, since Moore (age 30) was hired as an Expeditor in Customer Service on June 20, 1988 and/or August 1, 1988; Lynn Harvey (age 29) was back at work within two weeks of the layoff; and David Fickey (age 24, dispatcher) was back at work within three weeks of the layoff. (Mike Robinson at TR 82;

Jack Atkins at TR 215; Ex. 8, Quarterly Wage and Salary Report: 09/30/88; Ex. 14, Personnel Action Record: Rick Moore.) The Defendant asserted it ruled Plaintiff out for the Customer Service Position given to Harvey due to Plaintiff's alleged problems dealing with third parties, and since they ruled her out, in the light most favorable to her there must have been an "opening." (Ex. 18, Thompson letter to EEOC: 09/27/89.) The proof showed Plaintiff was qualified for any of those positions. (Charles Cox at TR 95-97, 109-110; Ray McCulloch at TR 182-183.) Within three weeks of the layoff, David Fickey (age 24) was back at work as a Dispatcher on a new product line, and he had to be trained for this new position. (Mike Robinson at TR 72; Ray McCulloch at TR 490-491; Ex. 10, Personnel Action Record: David Fickey.) Shortly before (or shortly after) the layoff, Rick Moore (age 30) had been hired as an Expeditor, and he had to be trained for this position, since his last position in 1985 was "dispatcher." (Ex. 8, Quarterly Wage and Salary Report: 09/30/88; Ex. 14, Personnel Action Record: Rick Moore; Ex. 36, List of terminations, p. 2.) The proof also showed that Plaintiff was qualified for and was

being trained for a Dispatcher position. (Charles Cox at TR 110; Ray McCulloch at TR 176-177, 182; Sarah Phelps at TR 291.) Pressley had previously worked as a Dispatcher and had done an "incredible job" in his last position. (Melvin Pressley at TR 419; Avery Petty at TR 255.) The Plaintiff was also qualified for the expeditor position. (Ray McCulloch at TR 183.)

The proof showed Defendant's policy was to lay off the least senior employees within the same classification if abilities were the same. (Jack Atkins at TR 198; Avery Petty at TR 246.) Atkins admitted to a bumping policy for salaried employees. (Jack Atkins at TR 200.)

> "Well, what I mean by that, then, my answer now; employees within the same classification, with all things being equal, of course we'd take the youngest person out of the people that were left and qualified to do the job, yes." (Jack Atkins at TR 200.)

Petty also testified that pursuant to company policy, given employees in the same classification whose skills were the same, supervisors would keep the more senior employees. (Avery Petty at TR 246-247; See also Charles Cox at TR 104.) In the light most favorable to Plaintiff, she was classified as a secretary at the

time of her termination. This was her title on the Job Title Listing Report and her supervisor regarded her as his secretary. (Ray McCulloch at TR 176; Ex. 7, Job Title Listing Report: 06/30/88.) The only other secretary at the time of the "reduction" was Sarah Lemmons (age 39), and she had been on payroll for less than a year and she had questionable typing, spelling, and grammar skills. (Ex. 7, Job Title Listing Report: 06/30/88; Ex. 32, Inter-office Correspondence: 12/09/87.) In fact, Petty admitted he did not let Plaintiff bump Sara Lemmons (age 39) due to Plaintiff's alleged "confidentiality" problem. (Avery Petty at TR 268.) A reasonable jury could conclude the alleged confidentiality problem was pretextual.

The proof also showed that the employees who were recalled or newly hired had lower salaries than the older employees who were laid off permanently. (Ex. 7, Job Title Listing Report: 06/30/88; Ex. 8, Quarterly Wage and Salary Report: 09/30/88.) The proof showed that the last salary for Sarah Phelps (age 55) was $1,528 per month. The salary as of September 1988 for Sara Lemmons (age 39) was $1,460 per

month. The last salary for Coy Plemmons (age 53) was $1,820 per month, and the last salary for Melvin Pressley (age 56) was $1,836 per month. The starting salary for David Fickey (age 24) was $1,352 per month; the starting salary for Lynn Harvey (age 29) was $1,246 per month; the starting salary for Rick Moore (age 30) was $1,612 per month, and the salary for Jerry Monger (age 32) was $1,352 per month. (Ex. 7, Job Title Listing Report: 06/30/88; Ex. 8, Quarterly Wage and Salary Report: 09/30/88.)

February 23, 1990

(Original on the letterhead of Elarbee, Thompson and Trapnell)
(Date stamped received by EEOC Nashville March 1, 1990)

Mr. A. Bernard Robinson

Senior Investigator

Equal Employment Opportunity

Commission

404 James Robertson Parkway, No. 1100

Nashville, Tennessee 37219-1588

Re: Sarah N. Phelps and Yale Security, Inc.,

EEOC Charge No. 253-89-0514

Dear Mr. Robinson:

The following responses are provided to you pursuant to your recent questionnaire regarding the above-captioned matter:

1. The Charging Party's (Ms. Phelps) personnel records reflect that the title of her position was Stenographer. In your response to the Request for Information, #9, Ms. Phelps, is listed as Secretary to Plant Manger. Which position did Charging Party hold at the time of her separation?

RESPONSE: At the time of her termination, Ms. Phelps was employed and classified as a Stenographer for the Manufacturing Department.

2. It is noted that Ms. Sara Lemmons was hired on 9/1/87 as a Secretary to the Plant Manager. Why was it decided that Ms. Lemmons would stay, and the Charging Party's position would be eliminated? Ms. Phelps had previously held the position as Secretary. Ms. Lemmons had just turned age 40 (7/9/48) one month prior to the separation of Ms. Phelps. Could the Charging Party have performed the duties of Ms. Lemmons? If not, explain why. Be specific in your response. (Please submit a coy of the personnel records maintained on Ms. Lemmons to include application for employment, date of birth, and date of hire).

RESPONSE: Ms. Phelps was employed for nine years as the Plant Manager's Secretary. On February 16, 1986, Avery Petty was promoted to Plant Manager - Lenoir City. On November 16, 1987, Ms. Phelps was transferred from the position of Plant Manger's Secretary to the position of Stenographer for

the Manufacturing Department. This change was made due to a poor working relationship that developed between Avery Petty and Sarah Phelps. A major factor in this decision was the lack of confidence in Sarah's ability to handle confidential information and her demonstrated inability to relate to other people. Based upon the fact that Sarah Phelps had been transferred from the Plant Manager's Secretary position on November 16, 1987, it was not practical to return her to this position in July, 1988. (A copy of Ms. Lemmons' application, date of birth, and date of hire are attached).

3. Please provide a copy of the job duties and requirements for the position of Customer Service Clerk, which is held by Ms. Lynn Harvey. Could Ms. Phelps have performed these duties? If not, explain why.

RESPONSE: The Customer Service Department was established in August, 1988. At the time of Ms. Phelps' separation, the final structure for the Customer Service Department and specific job responsibilities had not been determined. Concededly, Ms. Phelps had the ability to perform

the typing, filing, and record keeping aspects of the Customer Service Clerk position. However, the position also required direct customer contact and because it was felt that Ms. Phelps lacked the ability to relate to third persons in the manner the company insisted was necessary, it was determined that she would not have been a good candidate for the Customer service Position. (A copy of the job description for Customer Service Clerk in attached).

4. How was it determined that Ms. Phelps' position would be the one that should be eliminated? Be specific in your response, that is, what were the overriding factors which led to the decision to review Ms. Phelps' position for job elimination?

RESPONSE: The decision to eliminate Ms. Phelps' position was based upon the economics gained by cutting costs by elimination of unneeded jobs. it was determined that inefficiencies and cost savings could be obtained by the reassignment of some and elimination of other duties of the Stenographer.

5. For all aspects of Charging Party's duties (Manufacturing Stenographer), please provide the names, birth dates, dates of hire, an job titles for each individual who perform Charging Party's duties.

RESPONSE: The job duties of the Stenographer and the employees the duties were reassigned to are attached.

I hope the foregoing responds to the remaining unanswered questions in your investigation. If not, please contact me accordingly.

Sincerely,

Robert L. Thompson

RT/lar

Enclosures

YALE SECURITY, INC.

(Redlined word/phrases note typographical errors on original)

INTER-OFFICE

CORRESPONDENCE

Date	December 9, 1986
To	Ray McCulloch
Division & Plant	Lenoir City Plant
From	Avery Petty
Division & Plant	Lenoir City Plant
Copy to	P. J. Mccord, Kim Van Voorhis
Subject	"TO DO LIST"

1. Key - In - Lever -

   Build to order on customer and priority "B" orders. Can built 4,000 units with present spring inventory. This is definetly a priority. Don't delay for any reason.

2. Housekeeping - Plant

Certain areas of plant still do not satisfy me expecially the area around Mortise assembly or packaging and the area beside Yaletronics office. Must get their attention.

3. Plant Efficency -

Work with foreman and their respective departments. Variances are too high and the way to attack it is involvement. Get invoved and get foreman involved.

4. Inventory Preparation -

Follow up with each department to make sure they are prepared and organized.

5. Headcount -

Do we need to cut back in some areas due to backlog drop and shipment cutbacks. Review each area and we'll discuss.

(original signed "Avery")
Avery Petty

/sfl

Q Isn't it true that you made those type of comments and meant it as a joke?

A If I made them I was joking, yes, because I'm her age too, you now. I don't joke about my age. I'm in her category.

Q As far as the decision-making process about laying Sarah Phelps off, did you have a meeting where everyone was sitting around a table?

A Yeah, we normally had a meeting when it come time for a layoff.

Q And Avery Petty was there?

A I'm sure Mr. Petty was there, yes.

Q Mr. Robinson would be there?

A Yes.

Q And other management?

A All the staff level.

Q All right. You're sure you did some

fighting for Sarah Phelps' position; correct?

A I'm sure I did, yes.

Q They all -- who had to agree as far as you knew?

A Well, it was a mutual agreement between all of us, but if I remember it or recall right, I always talk to the people working with me because I didn't want to lose any of them.

No. 93-32

Supreme Court, U.S.
FILED
JUN 30 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

SARAH N. PHELPS,
Petitioner,

v.

YALE SECURITY, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Robert L. Thompson
Counsel of Record
Elarbee, Thompson & Trapnell
800 Peachtree-Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 659-6700

BEST AVAILABLE COPY

The Petition for Writ of Certiorari does not present any "special and important" reasons for certiorari review as those terms are used in Supreme Court Rule 10; more specifically, the decision rendered by the United States Court of Appeals for the Sixth Circuit does not conflict on any point of federal law with the decision of any other United States court of appeals, and the Petition should therefore be denied.

Statements of the case are fully set forth in the opinions of the Sixth Circuit and the district court, which are attached to the Petition.

The material facts as established in the record made during three days of trial showed that Petitioner was discharged in the course of a reduction of administrative positions when her supervisor identified her stenographer position as one which her department could do without. Although Petitioner placed volumes of testimony in the record in support of her contention that her age actually motivated the discharge, both

the district court and the Sixth Circuit agreed that the relevant evidence in the record could not sustain Petitioner's ultimate burden of showing age was determinative in the decision at issue. Accordingly, a judgment as a matter of law in favor of Respondent under Federal Rule of Civil Procedure 50(b) was proper.

The crux of Petitioner's arguments for Certiorari review by this Court is that the Sixth Circuit's formulation of the prima facie case in Phelps conflicts with three other Sixth Circuit panel opinions (see Petition at pp. 18 and 24) and six opinions from five other United States courts of appeal (see Petition at 18, 19, 21, 26 and 27). The supposed "conflicts" cited by Petitioner are **illusory**, as all the courts mentioned by Petitioner were applying the same burden shifting analysis recently explicated in St. Mary's Honor Center v. Hicks, No. 92-602 (June 25, 1993). Put simply, the differences between the opinions cited by Petitioner and the result in the instant case are not the result of

any conflict in the interpretation of federal jurisprudence; rather any conflict can be entirely accounted for on the basis of variations in the facts underlying each opinion. No clear conflict which can be effectively resolved by this Court therefore exists and certiorari review is inappropriate. 13 Moore's Federal Practice, ¶ 810.21 (2d. ed.).

In support of the preceding, respondent notes that both the opinions of the Sixth Circuit and district court in Phelps assumed that the various pieces of allegedly "unconsidered" evidence set forth in the Petition at pages 4-13 were sufficient to establish a prima facie case. See Petition at A-5 and A-17. The courts below were therefore not concerned with the legal issue said by Petitioner to require review by this Court; i.e., the quantum of evidence required to support a prima facie case. Rather, they were addressing whether the record evidence as a whole raised an issue of age discrimination.

Respondent suggests that Petitioner is confusing the term "prima facie case" as it applies to discrimination cases with that term as it is used in common law tort cases. While a plaintiff establishing a prima facie tort case is entitled to have his or her case decided by a jury, every circuit, including the Sixth, recognizes that a prima facie case of age discrimination entitles the plaintiff only to have the defendant explain the reasons for its actions. As Respondent did proffer explanations for its actions during the course of trial, the issue of whether Petitioner made out a prima facie case became moot for purposes of Respondent's Rule 50(b) motion, and the only remaining issue was whether Petitioner could demonstrate illegitimate motives for her termination. In making a determination on this latter issue, the Sixth Circuit applied the same federal rules on whether evidence is logically and materially related to an issue as are applied in every other United States court of

appeals. The fact that Petitioner disagrees with end result of the Sixth Circuit's analysis, as opposed to the legal norms being applied, is hardly grounds for Supreme Court review.[1]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

This 30th Day of June, 1993.

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[1] This consideration applies equally to the other supposed conflicts pointed to by the Petitioner: the significance of comment evidence (Petition at pp. 28-32) and references to untimely claims of discrimination (Petition at pp. 32-34). In both cases, the Sixth Circuit was not applying different legal doctrines from those applied in other United States courts of appeal. Rather, the underlying facts of the instant case are such that the Sixth Circuit properly came to a conclusion different from other circuit opinions applying the same rules to disparate records. No basis for Supreme Court review is supplied by such a context.